

Before the  
**COPYRIGHT ROYALTY JUDGES**  
The Library of Congress

*In re*

**NOTICE OF INQUIRY REGARDING  
CATEGORIZATION OF CLAIMS FOR  
CABLE OR SATELLITE ROYALTY  
FUNDS AND TREATMENT OF  
INELIGIBLE CLAIMS**

**Docket No. 19-CRB-0014-RM**

**COMMENTS OF THE JOINT SPORTS CLAIMANTS**

**MARCH 16, 2020**

## **CONTENTS**

I.	Introduction and Executive Summary .....	1
A.	The Judges Should Not Change the Claimant Categories.....	2
B.	Claims Validity Issues Are Properly Addressed In The Distribution Phase.....	7
II.	MGC’s Proposal To Revise the Claimant Category Definitions Is Without Merit and Should Be Denied.....	9
A.	The Current Definition of the Joint Sports Category Aligns with the MVPD Decision Making Process .....	10
B.	The Programming that MGC Seeks to Add to the JSC Definition Does Not Play the Same Role in MVPD Decision Making as Live Professional and Collegiate Team Sports.....	18
C.	The Current Claimant Categories Are Logically Organized According to the Role Each Category Plays in MVPD Decision Making.....	22
D.	MGC’s Proposed Changes Would Decrease Rather Than Increase The Accuracy of Allocation Phase Determinations .....	24
E.	The Current Categories Do Not Prejudice MGC .....	26
F.	The Current Claimant Categories Promote Settlement And Increase Efficiency .....	27
1.	The Current Claimant Categories Promote Settlement.....	28
2.	Adopting MGC’s Proposal Would Reduce Efficiency .....	28
G.	Adopting MGC’s Proposal Would Require Significant Changes to All Claimant Category Definitions .....	29
H.	Resolving Potential Disputes Concerning Claimant Representatives .....	30
III.	The Judges Should Retain the Unclaimed Funds Ruling .....	31
A.	The Unclaimed Funds Ruling Complies With The Copyright Act .....	31
B.	Allocation Phase Determinations Are Not Affected by the Unclaimed Funds Ruling .....	32
C.	The Unclaimed Funds Ruling Does Not Produce Inequitable Results .....	34
D.	Departing from the Unclaimed Funds Ruling Would Massively Expand the Scope of Distribution Proceedings and Would be Highly Inefficient .....	37

E.	Abandoning the Unclaimed Funds Ruling Would Make Distribution Phase Settlements Significantly More Difficult .....	39
IV.	Conclusion.....	40
Exhibit A - Declaration of Allan Singer		
Exhibit B - Declaration of Daniel Hartman		
Exhibit C - Declaration of Andrew R. Dick, Ph.D.		
Exhibit D - Declaration of James M. Trautman		
Exhibit E - Declaration of William E. Wecker, Ph.D. and R. Garrison Harvey		
Exhibit F - Proposed Regulations		

## **I. Introduction and Executive Summary**

The Joint Sports Claimants<sup>1</sup> (“JSC”) submit the following comments in response to the Copyright Royalty Judges’ (“Judges”) Notice of Inquiry Regarding Categorization of Claims for Cable or Satellite Royalty Funds, 84 Fed. Reg. 71,852 (Dec. 30, 2019) (“Notice”). In the Notice, the Judges request comments on two proposals, one made by Multigroup Claimants (“MGC”) and one made by Program Suppliers. MGC requests that the Judges jettison the claimant categories that the parties, Judges and their predecessors have successfully used for approximately forty years to produce accurate relative valuations in a manageable proceeding. In their place, MGC seeks a new definition of the JSC claimant category that encompasses not only live professional and collegiate team sports but also a variety of other “sports-related” content, including sports news programming, rebroadcasts of old games, high school sporting events, and non-team sports. Meanwhile, Program Suppliers requests that the Judges abandon a second, forty year practice that has facilitated the efficient management of the Allocation Phase proceeding whereby issues of claims validity are resolved in the Distribution Phase. Program Suppliers suggests that, instead, the Judges permit unlimited inter-claimant group discovery and litigation on claims validity issues during the Allocation Phase.

The Judges should deny both proposals. Neither proposal would improve the accuracy of the relative valuation performed by the Judges, and MGC’s proposal regarding claimant categories would render the relative valuation less accurate. Moreover, both proposals would make settlements far more difficult and increase costs and delays in resolving allocation and distribution controversies. Simply put, neither proposal furthers the policy objectives of Sections 111 & 119

---

<sup>1</sup> The Joint Sports Claimants are the Office of the Commissioner of Baseball, the National Football League, the National Basketball Association, the Women’s National Basketball Association, the National Hockey League, and the National Collegiate Athletic Association.

of the Copyright Act, *i.e.* reducing transaction costs and promoting the prompt distribution of royalties to copyright owners. To the extent the Judges desire to promulgate regulations regarding claims categorization and claims validity, they should formalize the current, long-standing practices. However, there is no need to delay the 2014-17 cable and satellite allocation proceedings while such regulations are promulgated. The pending stay should be lifted and the Judges should order that the long-standing practices continue to apply in the 2014-17 proceedings.<sup>2</sup>

**A. The Judges Should Not Change the Claimant Categories**

MGC's proposal regarding claimant categories is premised on the mistaken and unsupported conception that the current claimant categories are arbitrary and inconsistent with cable system operators' and satellite carriers' ("MVPDs") usual decision making process. To the contrary, the current claimant categories, and the current definition of JSC in particular, align with how MVPDs decide what programming to carry and how much to pay for it. For example, the current JSC category that MGC seeks to change includes only those types of sports programs—live professional and collegiate team sports—that have a distinctive ability to retain and attract subscribers and therefore drive carriage decisions. The programming that MGC is attempting to force into the definition of JSC lacks the very features that undergird the definition. JSC further notes that two types of programming to which MGC devotes substantial argument are already included in the current definition of JSC programming - tape delayed broadcast of live professional and collegiate team sports and live FIFA World Cup soccer matches (when carried on U.S. signals).

JSC submits with these comments the declarations of Allan Singer and Daniel Hartman. *See Exs. A & B.* Mr. Singer served as the senior programming executive for Charter from 2011

---

<sup>2</sup> Counsel for Major League Soccer ("MLS") has informed undersigned counsel that MLS concurs with the positions set forth herein.

to 2016 and the senior programming executive for Comcast from 2007 to 2009. Mr. Singer also has been an adviser to a major regional sports network. Mr. Hartman served as the senior programming executive for DirecTV from 2007 to 2013 and more recently has consulted for the cable and satellite industry on an array of issues. In their senior programming executive positions, Messrs. Singer and Harman had significant responsibility for what programming these services carried (including distant signals) and how much to pay for it. As Mr. Singer and Mr. Hartman explain, the programming that falls within the current JSC definition played a critical role in their decision making. Specifically, live professional and collegiate team sports have a distinctive ability to retain and attract subscribers that other programming—including the content that MGC seeks to add to the JSC definition—lacked. As a result, live professional and collegiate team sports drive MVPDs’ decisions to carry distant signals (and cable networks) in a manner that non-JSC sports related content does not. This content is thus viewed very differently by the decision makers.

Messrs. Singer and Hartman further explain that the critical role of live professional and collegiate team sports in MVPDs’ decision making is manifested in the contractual terms in carriage agreements between MVPDs and regional sports networks (“RSNs”). Such carriage agreements provide for rebates to the MVPDs if the RSN materially reduces its carriage of live professional or collegiate team sports events, and MVPDs consider it a breach of contract if the RSN ceases to carry the programming of a professional or collegiate team. No similar provisions apply to changes in carriage of sports news, rebroadcasts, non-college amateur sports, individual sports, or other sports-related content. These contractual terms confirm that it is the live professional and collegiate team sports content, and not the non-JSC sports-related content, that drive the decision to carry the RSN.

JSC also submits with these comments the declaration of Dr. Andrew Dick. *See* Ex. C. Dr. Dick is a competition economist with substantial experience with both MVPDs and sports programming rights. Dr. Dick has reviewed multiple lines of evidence—including industry expert testimony, economic and regulatory literature, data regarding royalty rates, and valuation evidence submitted in past proceedings. He confirms that, as Messrs. Singer and Hartman state, the current JSC definition is consistent with MVPD decision making. Dr. Dick explains that in evaluating options for defining claimant categories one should not view the current definitions as exclusively “claimant” focused and the MGC proposal as exclusively “program” focused. While the current categories do organize claimant groups, the organization is performed by grouping together claimants with programming that plays similar roles in the MVPD industry.

Not only would MGC’s proposal fail to improve the relative valuation, it would affirmatively weaken the valuation. As Dr. Dick discusses, this negative impact would flow from the fact that the main analytical tools used by the Judges to discern relative value—constant sum surveys and regressions—yield more accurate results when the groups being measured are, relatively speaking, more homogenous.<sup>3</sup> MGC’s proposal, however, would make the JSC category substantially less homogenous by combining together distinctive, high value live professional and collegiate team sports with low value non-JSC sports-related content that does not have the same ability to retain and attract subscribers. This increased heterogeneity would lessen the accuracy of the quantitative studies performed during the Allocation Phase.

MGC’s proposal also would have additional adverse consequences on the accuracy of the relative valuation. As explained in the attached declaration of James Trautman, a media expert

---

<sup>3</sup> Complete homogeneity of categories is not possible. As Dr. Dick explains, the current categories strike an appropriate balance between sufficient homogeneity and the need to create groupings of claimants in order to conduct the statutory task of allocating royalties in a manageable manner.

with more than thirty years' experience surveying cable system operators, he has already conducted the constant sum surveys for the 2014-17 cable Allocation Phase proceeding in reliance on more than forty years of stipulations. *See* Ex. D. Because it is important to conduct such surveys relatively close in time to the period being measured, the surveys cannot be redone at this late date. Changing the claimant categories for the 2014-17 proceedings years after the period at issue would impact the usefulness of the already-completed surveys. It also would be fundamentally unfair to the parties that have relied on the four decade-long historical convention. While there is no need to change the claimant categories, if one were to do so, the change would need to be made many years in advance to avoid adverse impacts on the studies used to determine relative value and undue prejudice to the parties.

Still further, adopting MGC's proposal would, contrary to the policy goals of Sections 111 & 119, inhibit settlements and increase the cost and inefficiency of Distribution Phase proceedings. Historically, many of the claimant categories (with the notable exception of those in which MGC has participated) have resolved Distribution Phase controversies without the need for a litigated Distribution Phase proceeding. That ability to settle derives from the fact that the members of the various groups own content that similarly affects MVPD decision making. As Dr. Dick explains, under the economic concept of equilibrium, the fact that the parties have historically stipulated to the categories indicates the parties' own view that the current categorizations maximize their economic interests and thus foster intra-group resolution. However, making the groups more heterogenous would result in groups of claimants with markedly different interests and content holdings, significantly reducing the likelihood of settlement. And absent settlement, Distribution Phase proceedings would become more costly and less efficient, because combining dissimilar programming into the same category makes the task of measuring relative market value



much more complex. The Judges would have to perform, as part of the Distribution Phase, a second allocation of royalties to owners of heterogeneous programming (in addition to the analysis performed during the Allocation Phase), some of which commands premium value and some of which does not.

Of note, denying MGC's proposal does not negatively impact MGC. Contrary to MGC's rhetoric, the value of its programming does not turn on its placement within a particular claimant category. Rather, as Dr. Dick explains, the valuation is determined by the inherent worth of programming. Placing low value rebroadcasts of old games or high school sporting events into the JSC category would not transform the content into the type of program that commands premiums from MVPDs. Rather, it would remain the same low value programming. One need look no further than the rates paid in the free market to see this. While MVPDs paid an estimated \$7.69 per subscriber for ESPN in 2019, they only paid an estimated \$0.27 per subscriber for ESPN Classic, the station that carried rebroadcasts of old games.

For all of these reasons, MGC's proposal should be rejected. However, if the Judges were to change the JSC claimant category definition, the Judges would also need to make similar changes to other claimant categories to maintain methodological consistency. For example, if the Judges were to conclude that all sports-related content should be placed in the JSC category, the same logic would require aggregation of other programming in similarly broad categories. If all sports-related programming is placed in the same category, so too should all scripted general entertainment programming be placed in a single category, regardless of whether it is currently considered Program Suppliers, Public Television or Canadian Claimant category programming. Likewise, all paid programming should be placed in a single category, not split between the Program Suppliers and Devotional categories, and all news programming should be in a single

category (not split between the Commercial Television, Program Suppliers, Canadian Claimant and Public Television categories). JSC does not recommend these changes, as they would result in yet further inefficiencies, but they are the logical result of adopting MGC's proposal.

**B. Claims Validity Issues Are Properly Addressed In The Distribution Phase**

Since the enactment of the Section 111 license over forty years ago, the Judges have conducted the Allocation Phase valuation by treating all programming within each claimant category as valid and claimed. Issues of claims validity have been addressed during the Distribution Phase. This approach allows for the Judges to effectively manage the enormous task before them by making an allocation among a small number of claimant categories, rather than conducting the impossible task of individualized litigations for millions of hours of programming and tens of thousands of unique programs. Confirming the sensibility of this long-standing practice, in most cases (again with the notable exception of categories in which MGC files claims), the parties have reached intra-category distribution settlements without the need for litigation concerning claims validity. Where claims validity issues have arisen—such as MGC's repeated claims for royalties on behalf of copyright owners it does not actually represent—these issues have been effectively resolved during the Distribution Phase.

Program Suppliers now wants to turn this process on its head. In particular, Program Suppliers seeks the right to take broad-based inter-claimant group discovery as part of the Allocation Phase and insists that the Judges must resolve claims validity issues during the Allocation Phase. As the Judges noted in their December 20, 2019 Order Staying Proceeding Pending Rulemaking ("Stay Order"), Program Suppliers' argument that its position is somehow required by the Copyright Act is meritless. The current procedure does not award royalties to invalid claims, and nothing in the Copyright Act requires resolution of validity issues in the Allocation Phase.

Moreover, adopting Program Suppliers' proposal would have material, adverse impacts on the Judges' ability to accurately and efficiently distribute royalties, putting Program Suppliers' proposal squarely at odds with the policy goals of Sections 111 & 119. As Dr. Dick explains in his declaration, moving claims validity to the Allocation Phase would have the perverse economic effect of encouraging parties to challenge the validity of claims, including claims in categories for which they have no content, merely as a means of increasing their settlement leverage. Given the enormous quantity of programming at issue in the Judges' distribution proceedings, these incentives will generate massive, far-reaching claims validity discovery during the Allocation Phase, and large numbers of validity disputes that must be litigated and resolved.

For example, in the stayed proceeding to allocate 2014-2017 cable royalties, Program Suppliers has filed a petition to participate that is five hundred and fifty pages long. It lists thousands of individual copyright owners that Program Suppliers purports to represent. The list contains no information concerning the specific programs each represented entity claims to own, nor does it provide any information that could be used to test the validity of those claims. At present, there is no reason for content owners outside of the Program Suppliers category to take issue with the validity of the claims in the Program Suppliers category. However, if a regime were adopted in which the Judges' valuation is potentially influenced by the number of invalid claims within a category, all parties would be incentivized to engage in extensive inter-category claims discovery and litigation. As Dr. William E. Wecker and R. Garrison Harvey explain in their attached declaration, this litigation would potentially entail the testing claims validity issues for tens of thousands of compensable programs carried under the Section 111 license during this period. *See* Ex. E (Declaration of Dr. William E. Wecker and R. Garrison Harvey) ("Wecker Decl."). Not only would Program Suppliers' proposal result in increased claims validity discovery

and litigation, it would also complicate the subsequent valuation, as the Judges would need to determine the value of an invalid claim or unclaimed content.

Such a large scale increase in the cost and level of effort required to complete the Allocation Phase is entirely unnecessary. Dr. Dick explains that whether some claims in a given category are ultimately determined to be invalid will not change the relative valuation. Valuation is a function of the marginal utility of a distant signal to a system operator, not the volume of claimed programming. This is especially true here, where all of the major content holders have filed claims and there is no reason to believe that any material number of such claims are invalid. In addition, because relative value is not driven by volume, but rather by the inherent utility of the programming in a given claimant category to MVPDs, it is logical to leave any royalties attributable to unclaimed or invalidly claimed programming within a given claimant group within that claimant group.

For all of these reasons, the Judges should reject Program Suppliers' proposal.

## **II. MGC's Proposal To Revise the Claimant Category Definitions Is Without Merit and Should Be Denied**

The Judges have inquired into "the merit of aggregating the Allocation Phase categories by program type rather than by claimant groups." Notice at 71,853. As part of this inquiry, the Judges asked whether the current category definitions are consistent "with the cable system operators' usual decision making process." *Id.* The current definitions, which the Judges and their predecessors have used since the early 1980s, are well aligned with the manner in which MVPDs make programming decisions. As a result, the definitions have consistently led to accurate Allocation Phase determinations that comport with the manner in which the programming at issue would be valued in a free market.

The Judges also “inquire as to the likely impact any particular set of Allocation Phase categories may have on (a) the cost and efficiency of distribution proceedings and (b) the likelihood of achieving settlements to resolve both Allocation Phase and Distribution Phase controversies.” *Id.* at 71,583-4. By grouping claimants in a manner consistent with industry decision making, the current definitions promote Distribution Phase settlements. The fact that most claimant categories settle without the need for a Distribution Phase proceeding is the best evidence of this point. If MGC’s proposal is adopted, the claimant categories will contain more heterogenous programming that plays dissimilar roles in the industry, and settlements will become much more difficult to achieve. Moreover, if a Distribution Phase proceeding is required using MGC’s proposed definitions, the process of measuring relative market value among members of a highly heterogenous claimant group will be substantially more complex and time consuming than in the case of a distribution among relatively more homogenous claimants.

**A. The Current Definition of the Joint Sports Category Aligns with the MVPD Decision Making Process**

MGC seeks to rewrite the current JSC category definition to include “(1) tape-delayed sports broadcasts; (2) rebroadcasts of games; (3) non-college amateur team sports; (4) FIFA World Cup football (soccer) matches; (5) Olympics and U.S. Olympic Trials; (6) individual sports (*e.g.*, golf, ice skating and boxing); (7) sports broadcasts originating in Mexico; and (8) sports highlight shows.” *See* Stay Order at 3.<sup>4</sup> MGC asserts, without any evidentiary support, that the current JSC category definition is “arbitrary” because there is “no inherent difference” between live professional and collegiate team sports content and other types of non-JSC sports-related content.

---

<sup>4</sup> In fact, two of these categories—tape-delayed sports broadcasts and live FIFA World Cup soccer matches (when carried on U.S. signals)—are already within the current definition of JSC programming. The remainder are distinct from JSC programming in the eyes of MVPD decisionmakers.

MGC Comments on Claimant Category Definitions and Proposed Modification, Dkt. No. 16-CRB-0009-CD (2014-17), at 6-12 (Apr. 19, 2019) (“MGC Comments”). MGC’s assertions are incorrect and entirely devoid of factual support. Tellingly, MGC admits that if there were evidence that “demonstrates that system operators select programming according to the criteria that differentiates the narrower definition of [JSC programming] from what is more generally understood to be ‘sports programming,’” then the current definition of JSC programming “could be rationalized.” *Id.* at 13. JSC has repeatedly submitted such evidence in Allocation Phase proceedings, and does so again in the declarations submitted with these comments.

MVPD programming executives, as well as economists, view live professional and collegiate team sports programming as playing a distinct and critical role in MVPD carriage decisions. As Allan Singer and Daniel Hartman explain in the attached declarations, this distinct role stems from the notable power of live professional and collegiate team sports to retain and attract subscribers. *See* Ex. A, ¶¶ 17-27 (Declaration of Allan Singer) (“Singer Decl.”); Ex. B, ¶¶ 13-21 (Declaration of Daniel Hartman) (“Hartman Decl.”). Subscribers are passionate about their professional and collegiate sports teams in a way that does not extend to other sports-related programming. Unlike other types of programming, subscribers insist on being able to watch their favorite teams in real-time. These programs are one of the last forms of “appointment viewing” and once the game is over, it is of little value, making the rebroadcasts of old games referenced by MGC an entirely different species. Singer Decl. ¶ 18; Hartman Decl. ¶ 14. JSC programming is also typically only available from a single linear channel and was generally not available from over-the-top services such as Netflix, Amazon, and Hulu during the 2014-17 period, which makes it more exclusive than most other content carried on distant signals. Singer Decl. ¶ 18; Hartman Decl. ¶ 18. If an MVPD programming executive chooses not to carry a channel with JSC

programming, she will generally not have any alternative means to provide that JSC programming to her subscribers, and risks subscriber losses as a result. Hartman Decl. ¶ 15.

Mr. Singer describes the critical role played by live professional and collegiate teams sports as follows:

The live professional and collegiate team sports currently within the definition of JSC have the power to drive and retain video customers. It is this distinctive characteristic of live professional and collegiate team sports that differentiates them and makes them much more valuable than the other types of programming, including the additional sports programming that MGC seeks to bolt onto the current JSC definition. In my decades of experience as a cable programming executive, I elected to retransmit distant signals based on the live professional and collegiate sports content available.

Singer Decl. ¶ 12.

Similarly, Mr. Hartman explains:

As an MVPD programming executive, the mere fact that a program was somehow related to sports did not mean I viewed it in the same manner I viewed JSC programming. Non-JSC sports-related content is simply far less valuable to MVPDs, because it does not play remotely the same role in attracting and retaining subscribers. The distinctive qualities that make live team sports so important to MVPDs are missing from individual team sports and “sports-related” content like talk shows, highlight reels, and replays of past sporting events.

Hartman Decl. ¶ 22.

This distinctive value of JSC programming is tied, in part, to the cultural importance of team sports in the United States. Singer Decl. ¶¶ 19-20; Hartman Decl. ¶¶ 14, 17. Most Americans live in a region associated with one or more professional or collegiate teams, and these teams play a significant role in the culture of these communities. Singer Decl. ¶ 19; Hartman Decl. ¶¶ 14, 17. Those fans expect to be able to see their teams’ games, and distant signals play an important part in ensuring that they can do so. For example, to retain a subscriber who is a New York Mets fan in upstate New York, it would be important to offer the fan access to Mets games on WWOR, a broadcast signal from New Jersey, as well as nationally-televised games involving the Mets on

Fox. Singer Decl. ¶ 22. Likewise, offering the Baltimore Orioles and Maryland Terrapins games on WJZ to Orioles fans throughout Maryland and in parts of Virginia, West Virginia, and Pennsylvania, is important to keeping those subscribers on the platform. *Id.* In the case of NFL telecasts on Fox, Mr. Singer explains that “I knew that a significant number of Detroit Lions fans live in Milwaukee, Wisconsin, and receive a local Fox signal that carried Packers games. If I could import the Detroit Fox signal to Milwaukee, it would be a significant addition to my program line-up.” Singer Decl. ¶ 21. Without access to that programming, those fans would likely seek out an alternative cable or satellite provider. *See* Singer Decl. ¶ 21. In contrast, and as explained further below, MVPD programming executives do not make distant signal carriage decisions based on non-JSC sports-related content.

There are numerous, objective indicia of the distinctive role that live professional and collegiate team sports play in MVPD decision making. As discussed by Messrs. Singer and Hartman, MVPDs treat live professional and collegiate team sports programming differently than they treat other sports-related content in their carriage agreements. Singer Decl. ¶¶ 28-39; Hartman Decl. ¶¶ 21, 33-34. Specifically, carriage agreements with RSNs, which charge among the highest carriage fees in the industry, contain provisions that make downward price adjustments when there is a material reduction in the number of live professional and collegiate team sports games carried. The contracts do not contain similar adjustments for non-JSC sport-related content. Singer Decl. ¶ 13; Hartman Decl. ¶¶ 21, 33. Dr. Dick explains that this fact confirms that the MVPDs view the live professional and collegiate sports differently than they view non-JSC sports-related content, and that it is the live professional and collegiate sports programming that drives MVPDs’ decisions to pay the high rates they do in order to make the RSNs available to their customers. *See* Ex. C, ¶¶ 41-49 (Declaration of Andrew R. Dick, Ph.D.) (“Dick Decl.”).



The manner in which the media covers sports also highlights the importance and distinctive status of JSC programming. The MLB, NBA, NFL, NHL are often referred to as the “Big Four” of American sports leagues in the press. Singer Decl. ¶ 20. Polling shows that most Americans consider a professional or collegiate team sport to be their favorite sport. *Id.* The popular website FiveThirtyEight described a day on which none of those four leagues played as “the worst sports day of the year.” *Id.* Non-team sports organizations, like Ultimate Fighting Championship (UFC), struggle to find a place in the culture similar to that which team sports command. Hartman Decl. ¶ 24.

Marketplace evidence further confirms that MVPDs view JSC programming as a distinctive category of content. MVPDs routinely pay significantly more to carry JSC programming than they do to carry any other category of content, including non-JSC sports-related content. The fact that MVPD programming executives are willing to pay significantly more for JSC programming than other types of programming—including other types of sports programming—demonstrates that the current definition of JSC programming aligns with MVPD decision making processes.

For example, it has long been the case that ESPN is the most expensive cable network to carry. SNL Kagan estimates that in 2019 ESPN charged \$7.69 per subscriber per month. Dick Decl. ¶¶ 43, 49. That rate is multiples of what the most expensive general entertainment or news network costs to carry. *Id.* at ¶ 37. As Messrs. Singer and Hartman explain, ESPN commands a premium price because of the valuable JSC programming it offers—not its sports news programs or highlight shows. Singer Decl. ¶ 24; Hartman Decl. ¶¶ 19, 33. Confirming that it is the live professional and collegiate team sports that drives ESPN’s premium, ESPN Classic, which focuses on sports specials (such as documentaries) and rebroadcasts of old games—neither of which are

currently defined as JSC programming—only charges \$0.27 per subscriber, and is carried in far fewer cable packages. Dick Decl. ¶ 43.

Likewise, RSNs are among the most expensive cable networks to carry, and their value is tied directly to the JSC Programming they offer. Singer Decl. ¶¶ 24-27; Hartman Decl. ¶ 19. In the 2014-17 period, RSNs charged an average of \$2.17 per subscriber per month for carriage (and as high as \$6.11), which was significantly higher than any general entertainment network. Dick Decl. ¶ 37. Both Mr. Singer and Mr. Hartman explain that they paid these rates for the live professional and collegiate team sports content, not the non-JSC sports related content. Singer Decl. ¶¶ 24-27; Hartman Decl. ¶ 32.

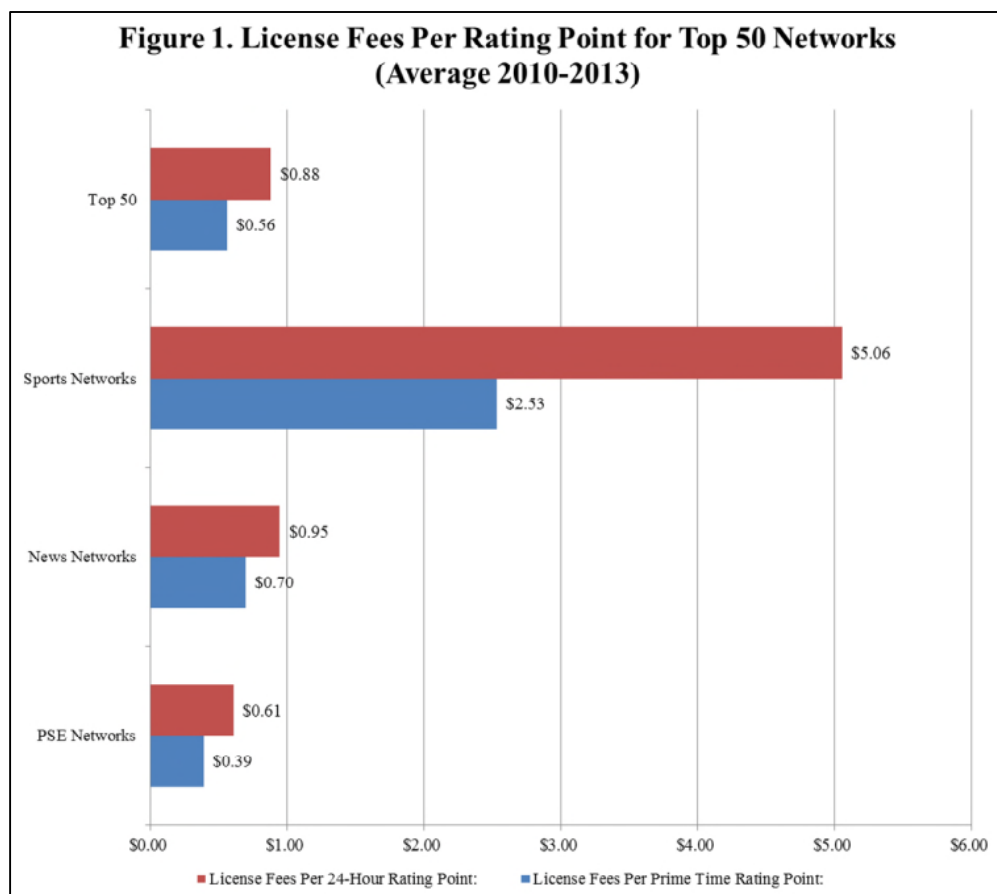
Moreover, when RSNs market their programming, they consistently focus their efforts on the JSC programming they carry. Singer Decl. ¶ 26. For example, Fox’s RSN website, as of March 2020, advertised each RSN in the following manner: :



*Id.* Each RSN on this page is advertised by reference to the MLB, NBA, NFL, NCAA, and/or NHL teams that each network carries. RSNs are among the most expensive cable networks to carry, and it is revealing that they choose to focus their advertising efforts on their JSC

programming, and not other non-JSC sports-related content on their networks, such as sports talk shows.

Additionally, in recent Allocation Phase proceedings, JSC adduced significant marketplace evidence demonstrating that MVPDs are substantially more willing to pay for cable networks featuring JSC programming than other types of content, even after accounting for different levels of viewership. For instance, in the 2010-13 period, MVPDs paid between 6.5 and 8.3 times more for cable networks featuring JSC programming than they did for other non-JSC networks, as illustrated in the following chart:



Ex. D, ¶ 13 (Declaration of James M. Trautman) (“Trautman Decl.”).

In turn, cable networks are willing to pay significantly more for JSC programming because they know they will receive these high carriage fees from MVPDs. As Dr. Israel testified in the

2010-13 cable proceeding, this is true even after accounting for differences in volume and viewing. The table below depicts this phenomenon for TNT and TBS, which both carry JSC programming as well as general entertainment programming. While JSC programming made up 1.95% of programming volume on TBS and 2.79% of programming volume on TNT, those networks spent 44.4% and 45.46% of their overall programming budgets, respectively, on that programming.

Network	Category	Total Programming Hours	Total HHVH (000)	Expenditures (\$M)	Expenditures per Hour of Programming	Expenditures per Hour of Viewing
		[A]	[B]	[C]	[D] = [C] / [A]	[E] = [C] / [B]
TBS	JSC	684.0	1,220,722.6	\$1,031.0	\$1,507,370.6	\$0.845
	Non-JSC	34,356.0	20,880,757.4	\$1,291.2	\$37,581.7	\$0.062
	JSC / Non-JSC	0.02	0.06	0.80	40.11	13.66
	JSC % of Total	1.95%	5.52%	44.40%		
TNT	JSC	977.0	2,513,281.9	\$2,042.0	\$2,090,056.2	\$0.812
	Non-JSC	34,063.0	29,162,878.1	\$2,450.2	\$71,931.9	\$0.084
	JSC / Non-JSC	0.03	0.09	0.83	29.06	9.67
	JSC % of Total	2.79%	7.93%	45.46%		

Hartman Decl. ¶ 20.

The widespread willingness to pay very high amounts for JSC programming is also confirmed by recent industry reports. One example from 2019 explains that:

Fans will pay for video packages and add-ons to ensure they never miss a minute of their favorite team in action, and the major media conglomerates know it. TV networks shell out big bucks to the pro leagues for the rights to broadcast games. Networks pass the cost of rights on to multichannel operators through license fees and retransmission, then to the consumer in the form of higher bundle prices and surcharges.

Dick Decl. ¶ 39.

Cable operator survey evidence introduced in prior Allocation Phase proceedings also demonstrates that JSC Programming is a distinctive category. In numerous Allocation Phase proceedings, the Judges and their predecessors have placed significant (and even primary) weight on cable operator survey evidence presented by Bortz Media and Sports Group (the “Bortz

Surveys”) and Howard Horowitz (the “Horowitz Surveys”). *See* Trautman Decl. ¶ 3. These surveys ask respondents to value “live professional and collegiate team sports programming” as a category<sup>5</sup>, and therefore rely upon the ability of cable industry executives to distinguish between such JSC programming, as it has historically been defined, and other types of sports content. Trautman Decl. ¶¶ 8, 14. Industry witnesses have consistently testified that these surveys provide reliable valuations of JSC programming, or may even be conservative. Trautman Decl. ¶ 12.

The Horowitz Surveys, while significantly flawed in several respects, also provide an additional datapoint demonstrating that cable operators view live professional and collegiate team sports differently than they view individual team sports programs. Trautman Decl. ¶ 15. When asked to value both “live, play-by-play coverage of professional and college team sports” and “other sports programming,” on average, cable system operators reported that the live professional and collegiate team sports were approximately three and a half times more valuable than other sports programming. *See* Distribution of Cable Royalty Funds, 84 Fed. Reg. 3552, 3585 (Feb. 12, 2019). This was true even though the Horowitz Surveys provided highly misleading examples of “other sports” programming and the Judges ultimately determined to redistribute the Horowitz Surveys’ allocation to “other sports” proportionally among the other categories. *Id.* at 3591.

**B. The Programming that MGC Seeks to Add to the JSC Definition Does Not Play the Same Role in MVPD Decision Making as Live Professional and Collegiate Team Sports**

MGC proposes to add all content that is “of a predominantly sports nature” to the Joint Sports category. MGC Comments at 15-16. This would include “(1) tape-delayed sports broadcasts; (2) rebroadcasts of games; (3) non-college amateur team sports; (4) FIFA World Cup football (soccer) matches; (5) Olympics and U.S. Olympic Trials; (6) individual sports (*e.g.*, golf,

---

<sup>5</sup> The Horowitz Surveys asked respondents to value “live, play-by-play coverage of professional and college team sports.” Trautman Decl. ¶ 15.

ice skating and boxing); (7) sports broadcasts originating in Mexico; and (8) sports highlight shows.”<sup>6</sup> See Stay Order at 3. This additional programming does not play the same role in decision making by MVPDs that JSC programming does.

As set forth in the attached declarations from Allan Singer, Daniel Hartman, Andrew Dick, William Wecker and R. Garrison Harvey, MVPD executives distinguish the following Non-JSC Sports from JSC programming:

- ***Sports Highlight Shows and Rebroadcasts of Games.*** Unlike JSC programming, these categories of content are not live, and therefore lack the urgency and excitement of a live team sports event in which the result is unknown. Singer Decl. ¶ 29; Hartman Decl. ¶ 31. In the case of rebroadcasts, many of the games at issue are decades old—a typical example might be a classic college bowl game from the 1980s or 1990s—and primarily appeal to a relatively small subset of fans who remember when the game was first played and the players who played in it. Hartman Decl. ¶ 35. Subscribers are not passionate about either category of programming, and MVPDs would not risk significant subscriber losses if they did not carry this programming. *Id.*; Singer Decl. ¶ 29. As Messrs. Singer and Hartman explain, such programming does not drive the carriage of distant signals or cable networks.

Decisions by industry participants operating in the free market bear this out. For example, MVPDs pay industry-high rates for ESPN and RSNs because of their live professional and collegiate team sports. See *supra* Section II.A. Moreover, the fact that RSN carriage contracts adjust price in the event that an RSN loses the rights to a material number of live professional and

---

<sup>6</sup> Revising the definition of the JSC category to include non-college amateur sports would not add live FIFA World Cup soccer matches to the category. Live telecasts of FIFA soccer matches on U.S. commercial signals already fall within the Joint Sports category. Likewise, JSC categorized the small amount of distantly retransmitted tape-delayed sports broadcasts as JSC programming in the most recent Allocation Phase proceeding.

collegiate team sports, but not for sports highlight shows or rebroadcasts of games, confirms that the former are distinct from the latter and play different roles in MVPD decision making. Similarly, that MVPDs pay more than twenty times as much per subscriber for ESPN as they do for ESPN Classic reflects the materially different roles live professional and collegiate team sports as compared to rebroadcasts of games play in MVPD decision making. Dick Decl. ¶ 43. Similarly, MVPDs pay approximately twenty-three times as much to carry ESPN as they do to carry ESPNNews, a cable network that consists primarily of sports news programs. *Id.*

- ***Non-College Amateur Sports.*** These sports, such as high school football, are not seen as particularly valuable and do not drive MVPD decisions to carry distant signals or cable networks. Singer Decl. ¶¶ 34-35; Hartman Decl. ¶ 30. The presence of such programming on a particular cable network also does not increase its value to an MVPD; for example, MVPD executives understand that some non-college amateur sports programs, like high school prep football, are available on RSNs. They do not, however, assign any of the RSNs' value to these non-collegiate amateur sports programs because subscribers do not feel strongly about them and they do not attract or retrain subscribers. Singer Decl. ¶ 35; Hartman Decl. ¶ 30.

- ***Individual Sports.*** While certain non-team sports telecasts generate some interest by subscribers, they do not possess the same distinctive qualities that live professional and collegiate team sports have. Singer Decl. ¶¶ 32-33; Hartman Decl. ¶¶ 23-26. Subscribers feel less passion for non-team sports; loyalty to a team provides subscribers with an on-going emotional interest in the sport that generally does not exist for individual sports. Singer Decl. ¶ 32; Hartman Decl. ¶ 24. As a result, cable networks featuring individual sports, like the Tennis Channel, command far less in royalties than do cable networks like ESPN and RSNs that carry JSC programming. Dick Decl. ¶ 49 (in 2019, Tennis Channel cost \$0.15, compared to \$2.89 on average

for RSNs). Additionally, this programming does not drive MVPDs' decisions to carry distant signals, unlike JSC programming. Singer Decl. ¶ 32; Hartman Decl. ¶ 23.

- ***U.S. Olympics and Olympic Trials.*** In recent years, NBC has paid for exclusive U.S. broadcast rights to the winter and summer Olympics. As a result, the vast bulk of actual Olympics programming on broadcast signals is non-compensable network programming under Section 111.<sup>7</sup> A cable system would not import a distant NBC signal for duplicative network programming. Singer Decl. ¶ 36. While broadcasts of the Olympics and U.S. Olympic trials *are* sometimes compensable, the vast majority of such telecasts on U.S. commercial signals are not. Ex. E, ¶ 11 (Declaration of William E. Wecker and R. Garrison Harvey) (“Wecker Decl.”). Moreover, because the Olympics are only carried every other year for a few weeks, they are viewed by the MVPD industry more in the nature of a “special” than as JSC programming. Singer Decl. ¶ 36; Hartman Decl. ¶ 29.

- ***Sports Broadcasts Originating in Mexico.*** Mexican broadcast signals are very rarely carried under the Section 111 license. In the 2014-17 period, just five such signals were carried on a distant basis, and each was only distantly retransmitted by a single cable system. Wecker Decl. ¶ 10.<sup>8</sup> These signals were distantly retransmitted in just three markets, all near the Mexican border: Pharr, Texas; Winterhaven, California, and Albuquerque, New Mexico. *Id.* Cable systems operators in these communities likely import these signals not only for the live, professional team sports they offer, but also to provide Spanish language programming to the

---

<sup>7</sup> This programming is compensable under the Section 119 license; however, between 2016 and the present, royalties collected under the Section 111 license (approximately \$755 million) dwarfed those collected under Section 119 (approximately \$42 million). *See* Licensing Division Year-Over-Year Growth in the Copyright Royalty Funds (Dec. 31, 2019).

<sup>8</sup> During the same period, DirecTV carried only one distant Mexican broadcast station (XETV), and Dish Networks did not carry any.



Spanish speaking households in their community. Singer Decl. ¶ 38. The Judges should not revise the claimant category definitions in order address programming that is only distantly retransmitted in three communities, and which is carried on signals that are imported not only for their sports content but for their Spanish language programming.

**C. The Current Claimant Categories Are Logically Organized According to the Role Each Category Plays in MVPD Decision Making**

MGC attempts to draw a dichotomy between categories organized by “claimants” and categories organized by “programming.” No such exclusive dichotomy exists. To the contrary, the current categories, while used to organize various claimant groups, are built around the roles that the programming within each category plays in MVPD decision making. The glue that holds each category together, and enables the category to present a unified case in the Allocation Phase, is that the claimant categories have each formed around recognizable genres of broadcast programming. Dick Decl. ¶¶ 22-25.

The JSC category is limited to live professional and collegiate team sports because live professional and collegiate team sports have a unique ability to attract and retain subscribers and therefore play a distinct role in MVPD decision making. *See supra* Section II.A. Likewise, each of the other current category definitions aligns with MVPD decision making, because each category is comprised of content that has a common appeal to subscribers and therefore to MVPD decision makers:

- **The Commercial Television category** is organized primarily around local news programming, which MVPDs think perceive to be distinct from other types of programming and fulfilling different subscriber needs. Singer Decl. ¶ 42; Hartman Decl. ¶ 41.
- **The Program Suppliers category** consists primarily of movies, scripted programming, and paid programming. This programming is fungible and is only rarely relevant

to attracting and retaining subscribers. The non-JSC sports content—such as non-team sports programs and rebroadcasts of old games—that is included in the Program Suppliers category plays a similarly fungible role in MVPD decision making and therefore is logically grouped with other general entertainment programming. Singer Decl. ¶ 41; Hartman Decl. ¶ 42.

- **The Devotional category** is comprised of religious programming that appeals to a small subset of subscribers who appreciate programming related to their faith. Singer Decl. ¶ 45; Hartman Decl. ¶ 40. Devotional programming is also unique in that due to the economics of the industry and in some cases governing law, MVPDs do not typically pay to carry this content.

- **The Canadian Claimants category** combines multiple genres of programming, such as news and syndicated sitcoms, but is nonetheless organized around a common theme and purpose for MVPD decision making. Canadian Claimant programming shares the common characteristics of having been produced in Canada and airing on Canadian broadcast signals. Programming executives seek out this Canadian-originated programming in order to appeal to subscribers near the Canadian border who may have connections to Canada, or appreciate French-language programming from Quebec. Singer Decl. ¶ 44; Hartman Decl. ¶ 44.

- **The Public Television category**, like the Canadian Claimants category, includes numerous different “program types,” such as news and scripted programming. Public Television programming, as currently defined, nevertheless shares a common noncommercial, ad free nature, and programming executives may seek out this programming in order to attract and retain subscribers who prefer it to standard commercial fare. Singer Decl. ¶ 43; Hartman Decl. ¶ 43.

Simply put, these current categories strike an appropriate balance between assembling manageable categories that allow for an allocation among categories (rather than individually

litigating the value of tens of thousands of programs) and assuring sufficient homogeneity to allow for an accurate relative valuation. Dick Decl. ¶¶ 22-25, 50-67.

**D. MGC's Proposed Changes Would Decrease Rather Than Increase The Accuracy of Allocation Phase Determinations**

One of the Judges' central questions is how a given claimant category definition impacts the accuracy of valuations of relative market value. As explained above, the current categories facilitate an accurate assessment of relative market value because the categories comport with the way in which MVPDs make programming decisions. On the other hand, MGC's proposed changes to the categories would actively harm the accuracy of the valuation.

Dr. Dick explains that increasing the heterogeneity of the programming included in the JSC category would lessen the accuracy of the constant sum surveys and regression analyses upon which the Judges have historically relied to perform their relative valuations:

Economic principles indicate that efforts to measure programs' relative value will be more accurate when that analysis is performed using categories that group together programming that market participants regard as being relatively similar in economic value. Such categories improve the reliability and accuracy of the survey and regression analyses that the Judges have historically relied upon.

Dick Decl. ¶ 51.

The current claimant categories consist of programming that is easily identified and that plays relatively similar roles in MVPD decision making, thus increasing the utility of the survey. Expanding the definitions to include dissimilar programming with—as compared to the current categories—wide ranging values within the same category would impact the value of the survey's results. For example, under MGC's proposed definition, a response to a cable operator survey would commingle JSC programming that drives retention and attraction of subscribers and other “sports-related” content that does not. Trautman Decl. ¶ 5.

Likewise, regression analyses submitted in past proceedings, such as the Crawford study that the Judges relied upon in their 2010-13 Cable Final Determination, provide more accurate results when relatively homogeneous categories are used. Dick Decl. ¶¶ 54-57. That is because in these regression analyses each claimant category is treated as an “explanatory factor,” and as a matter of econometrics it is important to avoid measurement error in explanatory factors. As Dr. Andrew Dick explains in his declaration:

One way that measurement error can be introduced is through aggregating unrelated measures into a single potential explanatory factor. Suppose, for example, that an analyst wanted to estimate the relationship between weekly household spending on groceries and the number of people residing in a household. The analyst could estimate a regression that relies simply on the number of people in the household as the explanatory factor. However, if children consume less food than adults, this regression analysis would lead to unreliable results. The regression model sees two households, each with four residents, and would be incapable of fully explaining their differences in grocery spending. A more reliable regression model would estimate weekly grocery spending as a function of the number of children in a household and the number of adults in a household as separate measures.

Dick Decl. ¶ 56. Here, the proposed revision to the JSC category would likewise combine two sets of content that play very different roles into a single category, and would increase the likelihood of valuation errors.

Still further, MGC’s proposal to change the claimant categories comes far too late for purposes of the 2014-17 cable and satellite allocation proceedings. James Trautman explains in his declaration that it is important to perform the surveys relatively close in time to the years being measured. In reliance on approximately forty years of practice, and understanding that in prior Allocation Phase proceedings the Copyright Royalty Tribunal (“CRT”) criticized surveys that were not completed close in time to the royalty year being measured, Mr. Trautman has already performed the Bortz surveys for 2014-17. Trautman Decl. ¶¶ 8-10 & n.2. In addition, it would be fundamentally unfair to the parties who relied on the past practice and responsibly completed the surveys promptly after the years at issue. *See, e.g., Program Suppliers v. Librarian of Cong.*, 409

F.3d 395, 402 (D.C. Cir. 2005) (“[D]ue process may require that parties receive notice and an opportunity to introduce relevant evidence when an agency changes its legal standard . . .”) (citing *Hatch v. FERC*, 654 F.2d 825, 835 (D.C. Cir. 1981)); *Consol. Edison Co. of New York v. FERC*, 315 F.3d 316, 323 (D.C. Cir. 2003) (“Normally, an agency must adhere to its precedents in adjudicating cases before it,” and even where the statutory scheme allows for some deviation from precedent, doing so is permissible only if “the affected parties have not detrimentally relied on the established legal regime.”); *see also Woodward v. Dep’t of Justice*, 598 F.3d 1311, 1315 (Fed. Cir. 2010) (agency erred in applying new standard to adjudication “where claimants made strategic decisions in reliance on the old standard, before the new standard existed”). Indeed, the Judges previously rejected an attempt by Program Suppliers to make a change that would impact surveys that were already completed. *See Order Regarding Discovery*, Dkt. No. 14-CRB-0010-CD (2010-13), at 6 (July 21, 2016). The same logic applies here. While there is no need to change the claimant categories at all, in the event the Judges determine to make such changes, they should do so beginning with the 2020 royalty funds so that the parties can incorporate the changes in future surveys.

**E. The Current Categories Do Not Prejudice MGC**

As shown above, there is nothing “arbitrary” about the current claimant categories. Moreover, MGC’s assertion that it would somehow receive “dramatically” more in royalties for the same programming if its alleged sports-related content was moved to the JSC category is simply wrong. MGC Comments at 13-15. Dr. Dick explains that the value of programming is determined by its relative worth to an MVPD, not by the claimant category it is placed in. Dick Decl. ¶ 26. The objective evidence demonstrates that, by virtue of its power to retain and attract subscribers, live professional and collegiate team sports programming commands a premium that non-JSC sports-related content does not. For example, MVPDs pay an estimated \$7.69 per

subscriber for the live professional and collegiate team sports on ESPN yet only pay \$0.27 per subscriber for ESPN Classic and \$0.15 for the Tennis Channel. Dick Decl. ¶ 43. Moving rebroadcasts of old games or tennis matches to the JSC category would not convert such low value programming into high premium programming.

MGC assumes that if its alleged content was moved to the JSC category, it would be entitled to compensation based on its percentage of viewership. However, as the Judges have noted, viewership is not a proper allocation device among heterogeneous programming and thus would be entirely inappropriate if MGC content were included in the JSC category. *See* Distribution of Cable Royalty Funds, 84 Fed. Reg. at 3600 (“viewership . . . is not an adequate basis for apportioning relative value among disparate program categories”). Thus, MGC’s assertion that the current claimant categories have a “dramatic monetary consequence” is entirely without merit.

**F. The Current Claimant Categories Promote Settlement And Increase Efficiency**

The Judges correctly recognize that claimant categories must not only allow for an accurate relative valuation but also must promote settlement and allow for efficient, cost-effective litigation where settlements cannot be reached. The promotion of settlements and the reduction of transaction costs are express goals of Sections 111 & 119 of the Copyright Act. *See Nat’l Ass’n of Broadcasters v. Librarian of Cong.*, 146 F.3d 907, 911-12 (D.C. Cir. 1998); 1998-99 Phase II Determination, 80 Fed. Reg. 13423, 13428 (Mar. 13, 2015); Order Granting Phase I Claimants’ Motion for Partial Distribution of 2004 and 2005 Cable Royalty Funds, No. 2007-03 CRB CD 2004–2005, at 3 (Apr. 10, 2008) (“[T]he policy of the Copyright Act [is] to promote settlements.”); *see also Indep. Producers Grp. v. Librarian of Cong.*, 759 F.3d 100, 102 (D.C. Cir. 2014) (Judges’ functions include “encourag[ing] settlements”).

## **1. The Current Claimant Categories Promote Settlement**

History is the best proof that the current claimant categories succeed in promoting settlement. Most of the long-standing claimant categories have successfully settled intra-category (or “Distribution Phase”) disputes without litigation. In the recent proceedings to distribute 2010-13 cable and satellite royalties, there was no Distribution Phase litigation in the Commercial Television, Public Television, Canadian, Music, or NPR categories. With respect to the JSC claimant category, Distribution Phase disputes were settled without litigation among all copyright owners with valid claims to royalties in the category.

These settlements are possible because groups are organized around the common roles their programming plays in the eyes of MVPD decision makers. As Dr. Dick explains, the fact that the parties have agreed for approximately forty years as to the claimant category definition indicates to an economist that they view themselves as properly categorized in a manner that best represents their economic interests. Dick Decl. ¶ 10. Moreover, resolution is fostered by the ability to evaluate past awards and settlements to and among existing claimant groups against changed circumstances. Section 803(a)(1) of the Copyright Act stems in part from the recognition that the parties require “reliable precedent upon which [they] can base the settlement of their differences.” H. Rep. 108-408, at 5, 7 (2003) (statement of Marybeth Peters, Register of Copyrights). Introduction of new claimants representing programming that plays a materially different role in MVPD decision making would make resolution far more difficult because of the differing interests of these new claimants. And such changes would make it impossible to use the past as a benchmark for valuing future settlements.

## **2. Adopting MGC’s Proposal Would Reduce Efficiency**

Not only would MGC’s proposal reduce the likelihood of settlements, it also would increase the cost and time necessary to resolve Distribution Phase disputes. Revising the claimant

category definitions as MGC proposes would result in more heterogeneous claimant groups, and the parties would require complex methodologies for distributing royalties within the new categories. A party that has historically settled its claims, like the Commercial Television category (or the JSC category, setting aside MGC's repeated submission of invalid claims to JSC royalties) does so in significant part because the parties understand how to fairly apportion royalties among owners of programming that share similar roles in the MVPD industry. Dick Decl. ¶ 12. If new claimants, who own programming that plays a materially different role in MVPD decision making, join a claimant category, the parties will be forced to develop new methodologies to allocate royalties among themselves. Notably, the mechanical application of viewing-based methodologies as a measure of relative value, which the Judges have relied on in recent Distribution Phase proceedings, does not work to allocate royalties among heterogeneous categories of programming. *See* Distribution of Cable Royalty Funds, 84 Fed. Reg. at 3600 ("viewership . . . is not an adequate basis for apportioning relative value among disparate program categories").

**G. Adopting MGC's Proposal Would Require Significant Changes to All Claimant Category Definitions**

For all of the above reasons, MGC's proposal should be rejected. However, if the Judges were to adopt MGC's approach, methodological consistency would demand similar changes among other claimant groups. Dick Decl. ¶ 27. For example, if all sport-related content is grouped together regardless of the differing roles different types of sports programming play in attracting and retaining subscribers, then all scripted programming should be similarly grouped, regardless of whether it is currently in the Program Suppliers, Public Television, or Canadian Claimant category. Singer Decl. ¶ 16; Hartman Decl. ¶¶ 11-12, 39. Likewise, if all sports-related programming is grouped together, then logically so, too, should all paid programming be, whether it is currently in Program Suppliers or Devotional categories. Singer Decl. ¶ 16. And the same



would hold true for news programming, be it in the Commercial Television, Public Television, or Program Supplier categories. Singer Decl. ¶ 16. These are merely representative examples of the changes that the Judges would need to make in order to implement the categorization methodology MGC proposes, *i.e.* one in which programming is grouped together by broad classifications like “sports” and “news” rather than based upon the distinctive roles different categories of programming play in attracting and retaining subscribers. Carrying out these changes throughout the current claimant groups would further exacerbate the problems identified above. For all of the above reasons, the Judges should not proceed down this slippery slope.

#### **H. Resolving Potential Disputes Concerning Claimant Representatives**

The Judges’ Notice inquires “as to the need for mechanisms and standards to resolve any disputes as to the identity of participants seeking to represent a particular Allocation Phase category in an Allocation Phase proceeding.” Notice at 71,854. Identifying representatives for claimant categories has not been a significant issue and should not present a problem going forward, provided that the existing claimant categories are retained. These current representatives have a deep understanding of the substance and the CRB’s procedures, and have a significant financial interest in presenting a strong case on behalf of their respective claimant categories. Moreover, these representatives typically begin to develop evidence for use in future Allocation Phase proceedings years before those proceedings are commenced, and so their appointment as representatives ensures that the effort and expense put into developing that evidence is not wasted.

On the other hand, if the Judges depart from the long-standing claimant category definitions, the likelihood of controversies concerning which participants will represent the new claimant categories increases. For example, a hypothetical category defined to include all “news” telecasts would include copyright owners from at least the historical Canadian, Program Suppliers, Commercial Television, and Public Television categories. Potentially, participants in each of these

categories will vie to represent the category in the Allocation Phase, and many participants may also have to address conflicts of interest arising from the shuffling of the claimant category definitions. It is not possible to address the resolution of such disputes in the abstract. However, the increase in such disputes is one of the many reasons not to adopt MGC's proposal.

### **III. The Judges Should Retain the Unclaimed Funds Ruling**

For the last forty years, the Judges have applied what is often referred to as the “Unclaimed Funds Ruling.” *See* 1978 Cable Royalty Distribution Determination, 45 Fed. Reg. 63,026, 63,027 (Sept. 23, 1980). Under this approach, the Allocation Phase determination is made as if all programming within each claimant category has been validly claimed. Issues of claims validity and unclaimed programming are addressed, as necessary, during the Distribution Phase. The logic behind the Unclaimed Funds Ruling is straightforward and compelling. Validity determinations are unnecessary to make an accurate relative value determinations among the categories in the Allocation Phase. Yet, if one were to litigate the validity of each and every one of the tens of thousands of programs claimed in an Allocation Phase proceeding, the process would be unmanageable, with substantially increased costs and delays. Accordingly, the Judges should continue to apply the Unclaimed Funds Ruling.

#### **A. The Unclaimed Funds Ruling Complies With The Copyright Act**

Program Suppliers argues that the Unclaimed Funds Ruling violates the Copyright Act because it somehow allows for the distribution of royalties to ineligible claimants. As the Judges correctly recognized in the Stay Order, this argument is meritless. Stay Order at 8, n.8. The Unclaimed Funds Ruling does not result in distributions of royalties to invalidly claimed programming. Rather, it appropriately provides for resolution of claims validity during the Distribution Phase. Nothing in the Copyright Act compels that claims validity be addressed during the Allocation Phase.

**B. Allocation Phase Determinations Are Not Affected by the Unclaimed Funds Ruling**

The Judges inquire as to whether the Unclaimed Funds Ruling is “consonan[t] with the establishment of relative value.” Notice at 71,854. The answer is yes.

In the Allocation Phase, an accurate valuation does not turn on the identification of individual invalid or unclaimed programming. Valuation is not a function of the volume of valid claims. *See* Distribution of Cable Royalty Funds, 84 Fed. Reg. at 3592, n.148 (“As Dr. Gray himself conceded that his volume analysis was an insufficient basis for determining relative value of programming, the Judges will not rely on it”). Rather, it is determined by the marginal utility of the different types programming at issue. Thus, the presence of some invalidly claimed or unclaimed programs within a given category does not impact the overall relative valuation. As Dr. Dick explains in the attached declaration:

Valuation is driven by differences in the relative economic worth of different types of programming to market participants. A fundamental economic principle is that value in a free market is determined “at the margin” by the maximum amount that a buyer is willing to offer and the minimum amount that a seller is willing to accept for the last unit of the product or service that they are exchanging.<sup>9</sup> Economists use the term “marginal utility” to refer to this “at the margin” valuation.<sup>10</sup> [...] In the present context, this principle implies that MVPDs—whose demand for content is derived from the preferences of their subscribers—will value most highly the initial programs in a particular category, while each subsequent addition to the category will contribute incremental value at a diminishing rate. It follows that adding (or subtracting) a few extra units—or here, program rights claims—would have no material effect on the marginal utility of a distant signal to an MVPD, and therefore would have no discernable effect on market values. This is particularly true when, as here, all of the major rights holders have filed claims and there is no reason to question the validity of such claims (the exception being claims of MGC, many of which I understand have historically been shown to be invalid).

---

<sup>9</sup> Fred M. Gottheil, *Principles of Economics* (7th ed.), South-Western Cengage Learning, 2013 at 111 (“How much people value a good depends upon the utils they derive *from the last one consumed.*”) (emphasis in original).

<sup>10</sup> Michael L. Katz and Harvey S. Rosen, *Microeconomics* (Irwin/McGraw Hill, 3<sup>rd</sup> ed., 1998) at 49 (Marginal utility is “[t]he change in total utility associated with consumption of one additional unit of a good.”).

Dick Decl. ¶ 70.

Moreover, other than in unusual circumstances such as where a claimant inadvertently misses a filing deadline, the fact that a claimant does not file a claim for given programming is a strong indication that the programming has little value. Dick Decl. ¶ 74. The Section 111 proceeding is well known to copyright owners. If, notwithstanding well-established procedures for filing a claim an owner elects not to do so, that indicates the owner's understanding that the programming has little value. Otherwise, the owner would participate in the proceeding.

Past proceedings also indicate that invalid claims do not impact the overall relative valuation. In the most recent Allocation Phase proceeding, there was no evidence of invalid claims in most of the Allocation Phase categories, including the Public Television, Devotional, Commercial Television, Canadian Claimants, Music Claimants, and NPR categories. Indeed, the only invalid claims identified belonged to MGC and were limited in number. *See* Ruling and Order Regarding Objections to Cable and Satellite Claims, Dkt. Nos. 14-CRB-0010-CD (2010-13) & 14-CRB-0011-SD (2010-13), at 13-40; 45-49 (Oct. 23, 2017). None of the MGC programming found to be invalid was the type that drove the value of the claimant categories to which the programming belonged. Dick Decl. ¶¶ 70-73.

For this reason, the Program Suppliers' premise that Allocation Phase awards may be "inflated" by unclaimed or invalidly claimed programming is mistaken. Dick Decl. ¶ 69. The Allocation Phase measures the relative value of programming across categories. Differences in relative value across categories are not driven by the volume of programs, but rather by the premium that MVPDs place on certain programming in attracting and retaining subscribers. *Id.* That there might be ten unclaimed programs in the Program Suppliers category and three in JSC does not impact the relative valuation between these categories. Given this fact, there is nothing

inequitable about the Unclaimed Funds Ruling, and there is no need to perform any inter-category reallocation based on the presence of unclaimed programming or invalid claims. Dick Decl. ¶¶ 69-74.

**C. The Unclaimed Funds Ruling Does Not Produce Inequitable Results**

In their Stay Order, the Judges noted that “[a]ctual cases of inequitable allocations resulting from the CRT’s treatment of invalid claims, supported by evidence, may support the reallocation on an inter-category basis of royalties otherwise attributable to invalid claims.” Stay Order at 7. JSC is not aware of any such cases. The behavior of the parties over time indicates that the Unclaimed Funds Ruling has not resulted in inequitable allocation. If a particular claimant category was the victim of an inequitable allocation resulting from the Unclaimed Funds Ruling, one would expect that members of the claimant category would have objected to the rule long ago. Dick Decl. ¶¶ 13-15, 77. However, the Unclaimed Funds Ruling has been in use for decades, and was not challenged by any party between the 1978 Determination and the proceeding to distribute the 2010-13 cable royalties. *See* Order Regarding Discovery, Dkt. No. 14-CRB-0010-CD (2010-13), at 3-7 (July 21, 2016). In fact, the only party that has objected to the continued application of the rule in recent proceedings, Program Suppliers, argued *in favor* of the ruling in the proceeding to distribute the 1978 cable royalty funds and supported the Ruling in every proceeding until 2010-13. If Program Suppliers believed that it was consistently prejudiced as a result of the application of the Ruling, it would not have supported the Ruling for almost four decades before switching positions. Its historic positions indicate that Program Suppliers’ newfound opposition to the Unclaimed Funds Ruling derives not from inequitable results but rather from a strategic desire to disrupt the process and stymie other valuation methodologies. For example, as Mr. Trautman

explains, the Bortz Survey for 2014-17 has already been performed in reliance on the Unclaimed Funds Ruling and cannot be redone. Trautman Decl. ¶ 10.<sup>11</sup>

Just as no party complained about the Unclaimed Funds Ruling for decades, Congress has not sought to change the Unclaimed Funds Ruling when it has amended the Copyright Act. Congress has twice significantly revised the process of distributing compulsory copyright royalties, first by replacing the CRT with the Copyright Arbitration Royalty Panels (“CARP”), and then again when Congress replaced the CARPs with the Judges. *See* Copyright Royalty and Distribution Reform Act of 2004, P.L. 108-419 (Nov. 30, 2004) (creating the Judges); Copyright Royalty Tribunal Reform Act of 1993, P.L. 103-198 (Dec. 17, 1993) (creating the CARPs). In replacing the CARPs with the Judges, the legislative history expressly states that Congress was motivated to promote “expeditious, well-reasoned, and widely-supported outcomes.” 150 Cong. Rec. 3305, 3306 (2004). And yet Congress did not perceive a need to change the long-standing reliance on the Unclaimed Funds Ruling, and to JSC’s knowledge no party petitioned Congress to do so.

The Judges also should be wary of any party that claims to be able to show evidence of an alleged inequitable allocation. The mere presence of an unclaimed program or an invalid claim does not mean that an inequitable allocation exists. Dick Decl. ¶¶ 71-74. As explained above, it is the marginal utility of the programming, and not the volume, that informs the relative value. Moreover, the fact that a program is unclaimed is strong evidence that its owner does not deem the claim to be valuable. Dick Decl. ¶ 74. Still further, instances of invalidly claimed programming

---

<sup>11</sup> The valuations respondents provide when answering the Bortz survey questions are not affected by the presence of a small proportion of unclaimed or invalidly claimed programming on a distant signal. *See supra* Section III.B; Dick Decl. ¶ 78. Nevertheless, JSC anticipates that this would be a contested issue in an Allocation Phase proceeding in which the Unclaimed Funds Ruling did not apply.

are few and far between, and no evidence has been presented indicating that any of the claims for programming that drive the value of a given claimant category are invalid. Any party asserting that an inequitable allocation has occurred would need to come forward with a sound methodology for valuing the allegedly invalid programming.

Program Suppliers’ “viewing” methodology is unable to discern the value of invalid claims because, as the Judges have found, it cannot account for the premiums that MVPDs pay for different types of programming. *See* Distribution of Cable Royalty Funds, 84 Fed. Reg. at 3600. Rather, it simply sums the volume of viewing, regardless of whether the viewed programming has value to MVPDs. For example, Program Suppliers’ “viewing” methodology cannot differentiate between an unclaimed program that has no or little value to an MVPD (thus explaining its unclaimed status) and a highly valuable program for which an MVPD is willing to pay a substantial premium.<sup>12</sup>

Tellingly, to date, Program Suppliers have not come forward with any evidence of inequitable outcomes in connection with their challenges to the Unclaimed Funds Ruling. In one instance, Program Suppliers argued that the fact that MGC has content in the Public Television category somehow demonstrates that Public Television received a windfall.<sup>13</sup> However, Public Television explained that this is not the case. While MGC has been found to have invalid claims in multiple other categories, that does not mean its claims in the Public Television category are invalid.<sup>14</sup>

---

<sup>12</sup> The viewing methodologies that Program Suppliers have submitted in past proceedings also are replete with serious methodological errors and therefore are unreliable. *See* Distribution of Cable Royalty Funds, 84 Fed. Reg. at 3593-99.

<sup>13</sup> *See* Brief of Appellant at 37-38, *Program Suppliers v. Copyright Royalty Bd.*, No. 19-1063 (D.C. Cir. Dec. 3, 2019).

<sup>14</sup> *See* Joint Intervenors’ Brief in Support of Appellees at 18, n.3, *Program Suppliers v. Copyright Royalty Bd.*, No. 19-1063 (D.C. Cir. Dec. 3, 2019).

**D. Departing from the Unclaimed Funds Ruling Would Massively Expand the Scope of Distribution Proceedings and Would be Highly Inefficient**

The Judges also inquire “as to the likely impact any proposed rule for the identification and treatment of ineligible claims may have on . . . the cost and efficiency of distribution proceedings.” Notice at 71,854. The abandonment of the Unclaimed Funds Ruling would massively increase the cost and length of cable and satellite royalty distribution proceedings.

Under the Unclaimed Funds Ruling, claim validity issues are addressed on an *intra*-category basis in the Distribution Phase. 1978 Cable Royalty Distribution Determination, 45 Fed. Reg. 63026, 63027 (Sept. 23, 1980). As a result parties need not expend resources during the Allocation Phase to determine the extent of unclaimed or invalidly claimed programming within any other Allocation Phase category, because the presence of such programming does not affect the Judges’ allocation of royalties to the category. Without the Ruling, however, each Allocation Phase party would have a significant incentive to challenge the validity of claims in other categories in the Allocation Phase due to the perceived ability to influence the relative valuation by doing so. Indeed, parties would be incentivized to attack the validity of each other’s claims as a means of obtaining leverage. Efforts and investments traditionally focused on providing evidence of relative valuation would be diverted to unnecessary validity disputes. Dick Decl. ¶¶ 75-77.

The resulting battle of all-vs.-all would render the allocation proceeding unmanageable. In the 2014-17 period, cable operators retransmitted over fifty million hours of programming across significantly more than one thousand distant signals. Wecker Decl. ¶¶ 7, 8. They retransmitted tens of thousands of unique programs. Wecker Decl. ¶ 9. Allocation Phase parties like Program Suppliers have filed petitions to participate on behalf of thousands of copyright owners and copyright owner representatives; Program Suppliers’ petition itself is over five hundred and fifty



pages long. *See* Amended Joint Petition to Participate of the MPAA-Represented Program Suppliers, Dkt. No. 16-CRB-0009-CD (2014-17) (June 27, 2019). If the 2010-13 proceeding is any guide, those thousands of copyright owners in the Program Suppliers coalition will claim to own millions of hours of distantly retransmitted programming per royalty year. *See* Amended Written Direct Testimony of Christopher J. Bennett, Ph.D., Dkt. No. 14-CRB-0010-CD (2010-13), at Fig. 4 (Apr. 11, 2017).

An inter-category fight to assess the validity of each of Program Suppliers' claims, submitted on behalf of thousands of copyright owners to millions of hours of programming, would be immensely burdensome. For example, in the 2010-13 Cable Allocation Proceeding, Program Suppliers attempted to commence inter-category claim validity discovery by serving the following requests on each of the claimant groups:

1. The identity of the claimants you represent and documents supporting your authority to represent each claimant, and any documents that withdraw, revoke, deny, dispute, limit, qualify, or otherwise "may tend to undermine" your claimed authority to represent the claimant (see *Independent Producers Group v. Librarian of Congress*, 792 F.3d 132, 139 (D.C. Cir. 2015));
2. Accurate work identity information for each claimant identified (*e.g.*, correct copyrighted work and other identifying information in cases in which copyrighted works may be confused, etc.); and
3. A clear statement of each represented claimant's claim against each year's royalty fund, *i.e.*, for each copyrighted work identified in response to paragraph no. 2 above, identify the royalty year(s) for which it is claimed and the unique Agreed Category in which the copyrighted work is claimed.

*See* Order Regarding Discovery, Dkt. No. 14-CRB-0010-CD (2010-13), at 1, n.2 (July 21, 2016). Reversing the Unclaimed Funds Ruling would incentivize each claimant group to engage in similar discovery, and likely more. Responding to such discovery requests alone would introduce substantial and unnecessary burden and delay. And once the discovery is completed, the parties would need to litigate, and the Judges would need to decide, the validity of all challenged claims

before reaching the already complex and time consuming task of performing a relative valuation. This unnecessary increase in cost and delay is directly at odds with the policies underlying Sections 111 & 119.

**E. Abandoning the Unclaimed Funds Ruling Would Make Distribution Phase Settlements Significantly More Difficult**

The Judges' Notice also inquires into "the likelihood of achieving settlements to resolve both Allocation Phase and Distribution Phase controversies" if the Unclaimed Funds Ruling is adopted or replaced. Notice at 71,854. Under the Unclaimed Funds Ruling, many parties have historically succeeded in resolving Distribution Phase issues through settlement. For example, in the 2010-13 cable and satellite distribution proceedings, most parties, including Commercial Television, Public Television, Canadian Claimants, Music Claimants, and NPR, successfully settled Distribution Phase controversies without litigation. Jettisoning the Unclaimed Funds Ruling would make it much harder to achieve similar settlements in the future by decreasing the value of intra-category Distribution Phase settlement agreements.

As Dr. Dick explains, abandoning the Unclaimed Funds Ruling would encourage parties to engage in inter-category validity disputes. Dick Decl. ¶¶ 75-76. The emergence of large volumes of disputes is not conducive to settlement. Indeed, whereas under the Unclaimed Funds Ruling members of a given category satisfied with the validity of the claims of their category peers can enter into an efficient Distribution Phase settlement, removing the Unclaimed Funds Ruling would allow a claimant from another category to disrupt that settlement. This would significantly decrease the value of the intra-category Distribution Phase agreements, and make those settlements far less likely.

#### IV. Conclusion

For the foregoing reasons, the Judges should reject MGC's proposal to modify the claimant category definitions, and reject Program Suppliers' proposal to abandon the Unclaimed Funds Ruling. The claimant category definitions and Unclaimed Funds Ruling have stood the test of time because they promote accurate assessments of relative market value while simultaneously minimizing transactions costs and increasing the likelihood of settlement. JSC submits proposed regulatory language formally adopting the historic claimant categories and the Unclaimed Funds Ruling as Exhibit F hereto.

Respectfully submitted,

JOINT SPORTS CLAIMANTS

By: /s/ Michael Kientzle  
Daniel A. Cantor (D.C. Bar No. 457115)  
Michael Kientzle (D.C. Bar No. 1008361)  
Emily Reeder-Ricchetti (D.C. Bar No. 252710)  
Ryan D. White (D.C. Bar No. 1655918)  
ARNOLD & PORTER KAYE SCHOLER LLP  
601 Massachusetts Avenue, N.W.  
Washington, D.C. 20001  
202.942.5000 (voice)  
202.942.5999 (facsimile)  
Daniel.Cantor@arnoldporter.com  
Michael.Kientzle@arnoldporter.com  
Emily.Reeder@arnoldporter.com  
Ryan.White@arnoldporter.com

*Counsel for the Office of the Commissioner of  
Baseball*

## **Exhibit A - Declaration of Allan Singer**

Before the  
**COPYRIGHT ROYALTY JUDGES**  
The Library of Congress

*In re*

**NOTICE OF INQUIRY REGARDING  
CATEGORIZATION OF CLAIMS FOR  
CABLE OR SATELLITE ROYALTY  
FUNDS AND TREATMENT OF  
INELIGIBLE CLAIMS**

**Docket No. 19-CRB-0014-RM**

**DECLARATION OF ALLAN SINGER**

**MARCH 16, 2020**

## **I. Qualifications**

1. I have over twenty years of experience in the cable television industry as an executive involved with both the acquisition and the licensing of television programming. I spent the majority of this period as a senior programming executive at a number of the country's largest multi-video programming distributors ("MVPDs"), including Comcast, Charter and AT&T.

2. In 1996, I joined the programming department at the then-largest cable system operator, Tele-Communications, Inc. ("TCI"). I was responsible for negotiating the rights to distribute programming on behalf of TCI and its affiliated cable television systems, which served more than 16 million subscribers throughout the United States. In this role, I was responsible for determining the amounts TCI would pay to carry general entertainment networks, sports services, premium services, movie services, pay-per view events (sports, music, and movies), broadcast and local television stations, and religious and shopping programming.

3. In 1999, TCI was acquired by AT&T Corp. and rebranded as AT&T Broadband. I was promoted to SVP, Programming at AT&T Broadband and became the department head. After Comcast acquired AT&T Broadband, in 2003, I was named SVP, Programming Investments for Comcast. In that role, I assisted in the management of Comcast's various programming networks (e.g., E!, Golf Channel, OLN/VS, style, Comcast SportsNet Philadelphia); increasing the distribution and profitability of those assets; developing, launching and achieving distribution for new cable networks (e.g., G4, TV1, and Sprout); and acquiring the rights for and development of new regional sports networks (CSN Chicago, CSN Bay Area, CSN Mid-Atlantic, SNY). I also evaluated the acquisition of various cable networks. In order to evaluate these acquisitions, I determined the market value of these businesses as reflected in the per subscriber/per month ("PSPM") license fee cable systems operators ("CSOs") and other multichannel video providers would pay for the right to carry them.

4. In 2005, I became SVP, Sports Business Development for Comcast. I participated in the transition of Outdoor Life Network (“OLN”) from a sportsman/outdoors channel to a national sports service known as Versus (“VS”); acquired the national television and new media rights for the OLN/VS network (n/k/a NBC Sportsnet) from the National Hockey League; developed additional regional sports services; and negotiated for the rights to the National Football League’s Thursday night package. In 2007, I was appointed SVP, Content Acquisition at Comcast. I resumed my prior role in the valuation and acquisition of content for Comcast, which at that time was the country’s largest MVPD, serving more than 20 million subscribers. My responsibilities included negotiations with various program networks for carriage as well as acquiring the rights to exhibit video content via the Internet and on a “non-linear” basis (video on-demand or “VOD” and “download to go” rights).

5. In 2009, I became EVP, Distribution and Strategy, for the Oprah Winfrey Network (“OWN”), a joint venture between Discovery Communications, Inc. and Oprah Winfrey. Our business plan for OWN was to take Discovery Health Channel, which was at the time widely distributed for free, and rebrand the service as OWN. I developed the distribution strategy which transitioned all of the 80 million subscribers from the free Discovery Health Channel to a fee-based service in OWN. As such, it was critical to determine the most accurate yet highest PSPM license fee that MVPDs would pay for OWN.

6. In 2011, I moved to Charter Communications as SVP, Programming. My responsibilities at Charter were similar to those at Comcast, and included overseeing program acquisition and licensing. In addition, I was responsible for evaluating the impact from technology changes in the distribution of content on content valuations. As the head of programming at Charter, I reported to the CEO and was part of the senior team that rebuilt Charter into the most

profitable cable company in the country. During my tenure, Charter operated over 100 “Form 3” cable systems. I left Charter in the fall of 2016, shortly after its merger with Time Warner Cable in May 2016.

7. At both Comcast and Charter, I had ultimate responsibility for decisions regarding which distant signals to carry.

8. I am currently a consultant in the cable television industry, advising both cable networks and investors. I testified on behalf of the Joint Sports Claimants (“JSC”) in the 2010-13 cable royalty allocation proceeding.

9. My full resume is attached as Appendix A.

## **II. Introduction**

10. I understand that one claimant representative—the Multigroup Claimants (“MGC”)—has challenged the existing definition of the Joint Sports category. MGC seeks to significantly expand the category to include all “programming of a predominately sports nature.”<sup>1</sup> MGC proposes to include with the JSC definition (1) live telecasts of non-team sports events and non-college amateur sports; (2) rebroadcasts of games; (3) the Olympics and the U.S. Olympic trials; (4) sports highlights shows; and (5) sports broadcasts originating in Mexico.

11. In light of MGC’s proposal, the Judges have requested comments on the adequacy of the current definition, as well as the definitions of the other program categories. In particular, the Judges have inquired as to whether the JSC definition is consistent with cable system operators’ usual decision-making process.<sup>2</sup>

---

<sup>1</sup> Multigroup Claimants’ Comments on Claimant Category Definitions and Proposed Modification, Dkt. Nos. 16-CRB-0009 CD (2014-17) & 16-CRB-0010 SD (2014-17), at 15-16 (Apr. 19, 2019).

<sup>2</sup> Order Staying Proceeding Pending Rulemaking, Dkt. No. 16-CRB-0009 CD (2014-17), at 3 (Dec. 20, 2019).



12. The current definition of JSC, as well as the other claimant categories, is consistent with how cable programming executives make decisions regarding both what programming to carry and how much to pay for it. Cable programming executives do not view all programming bearing any relationship to sports—regardless of whether it is an NCAA or Major League Baseball game, horseracing, high school sports, or a sports news program—as a uniform category for which all content within the category plays the same role in programming decisions. Rather, cable programming decision makers view programming through the lens of what drives the retention and acquisition of subscribers. The live professional and collegiate team sports currently within the definition of JSC have the power to drive and retain video customers. It is this distinctive characteristic of live professional and collegiate team sports that differentiates them and makes them much more valuable than the other types of programming, including the additional sports programming that MGC seeks to bolt onto the current JSC definition. In my decades of experience as a cable programming executive, I elected to retransmit distant signals based on the live professional and collegiate sports content available. The other non-JSC sports related programming did not typically drive carriage decisions. Simply put, the current JSC definition accurately encompasses the sports content that has the distinctive ability to attain and retain video subscribers, *i.e.* live professional and collegiate team sports. As such, the definition is most consistent with how cable system operators make their decisions and value programming.

13. That live professional and collegiate team sports play a distinct role in cable system operators' decision-making is reflected in the terms of carriage agreements entered into between regional sports networks and cable systems. Although RSNs carry non-JSC sports programming such as high school football and sports news shows, cable system operators decide to carry these networks, and pay their very high license fees, primarily due to the presence of live professional

and collegiate team sports. The carriage agreements contain price adjustments provisions that call for rebates to operators if the RSN significantly decreases its number of live professional and collegiate team sports games. There is no similar provision for the other sports-related content included on RSNs, demonstrating that cable system operators treat live professional and team sports differently as a contractual matter from other sports-related programming.

14. In evaluating MGC's proposal, one should not view the current definitions as "claimant centric" and the MGC proposal as "program centric." While the current definitions are used to form claimant groups, the definitions themselves are based on groupings of programming that play similar roles in cable system operators' decision making.

15. Granting MGC's request to expand the JSC definition to capture any programming related to sports in any manner would deviate from the manner in which cable system operators make decisions about programming and would lead to a less accurate relative valuation.

16. While I focus on the JSC definition because that is what MGC seeks to change, I note that if one were to adopt MGC's proposal and place all programming bearing any relationship to sports into a single category, then, for logical consistency, one would also place all paid programming currently in the Program Suppliers and Devotional categories into a single category. Likewise, one would combine all scripted programming (currently in the Program Suppliers and PTV categories) into a single category. Still further, one would create a single category for news programming currently in the CTV, Program Suppliers, and PTV categories. There are good reasons not to take such steps, but they illustrate the logical conclusion of engaging on the unsound logic proposed by MGC.

### **III. Cable System Operators View Live Professional and Collegiate Team Sports Differently Than Other Types of Programming**

17. As I have explained in prior testimony, because of escalating programming costs eroding the margins cable system operators earn from their video offering, cable system operators' decisions concerning what programming to carry and how much to pay for it is based on the power of the programming to retain existing and attract new subscribers. As I previously testified, the question asked is "will I lose a video customer if my company does not have this content."

18. In the 2014 through 2017 time period that is the subject of the pending cable and satellite royalty distribution proceedings, live professional and collegiate team sports was the most important content for retaining and attracting subscribers. The reasons are straightforward. Many fans of JSC programming are deeply passionate and are likely to switch MVPDs if they lose access to their favorite teams. During this time period, JSC programming was generally unavailable or expensive to obtain via over-the-top services. Additionally, because they are live exhibitions, JSC games are one of the last forms of "appointment viewing" on television.

19. One reason that live professional and collegiate team sports are particularly appealing to subscribers is because the clubs and schools that make up each league are strongly associated with particular geographic fan bases. Nearly fifty American cities are home to one or more NBA, NFL, MLB or NHL teams.<sup>3</sup> In those parts of the country without a professional team, major college sports programs, like the West Virginia Mountaineers in Morgantown, West Virginia, attract equally devoted audiences. These regional fan bases provide a consistent, passionate base of interest for this programming; watching their local teams year in and year out

---

<sup>3</sup> "North American Sports Franchises," Stadium Maps (last updated Nov. 21, 2019), <http://www.stadium-maps.com/facts/sports-franchises.html>.

is simply part of the fabric of the community. These fans expect to have access to their team's programming.

20. The passion for live professional and collegiate team sports—as opposed to other sports-related content—is measurable and widely known. In a 2015 public opinion poll, nearly four out of every five Americans indicated that a professional or collegiate team sport was their favorite sport.<sup>4</sup> Such is the popularity of the “big four” professional sports leagues that FiveThirtyEight refers to days when all four of these leagues play a game as a “sports equinox,” and dubbed October 19, 2017, the “Greatest Sports Day of the Year” because there were nine NHL games, three NBA games, an NFL game, and an MLB playoff game all on the same day.<sup>5</sup> Conversely, the website refers to the day after the MLB All-Star Game as the “deadest sports day of the year” because, most years, none of the NFL, NBA, MLB or NHL play a single game on that day.<sup>6</sup>

21. It was the power of live professional and collegiate team sports programming to retain and attract subscribers that drove most of my decisions regarding the carriage of distant signals. For instance, I knew that a significant number of Detroit Lions fans live in Milwaukee, Wisconsin, and receive a local Fox signal that carried Packers games. If I could import the Detroit Fox signal to Milwaukee, it would be a significant addition to my program line-up. Without those Lions games, I would risk losing those fans to a competitor.

---

<sup>4</sup> Larry Shannon-Missal, “Pro Football is Still America’s Favorite Sport,” Harris Poll (Jan. 26, 2016), <https://theharrispoll.com/new-york-n-y-this-is-a-conflicting-time-for-football-fans-on-the-one-hand-with-the-big-game-50-no-less-fast-approaching-its-a-time-of-excitement-especial/>

<sup>5</sup> Neil Pane, “This Is The Greatest Sports Day Of The Year,” FiveThirtyEight, (Oct. 19, 2017), <https://fivethirtyeight.com/features/this-is-the-greatest-sports-day-of-the-year/>

<sup>6</sup> Neil Pane, “The Deadest Sports Day of the Year,” FiveThirtyEight, (Jul. 17, 2014), <https://fivethirtyeight.com/features/the-deadest-sports-days-of-the-year/>

22. Likewise, New York Yankees and Mets games on broadcast stations like WWOR and WPIX appeal to Mets and Yankees fans beyond the local service areas of those stations. Cable operators who could retransmit those signals to subscribers in upstate New York, Pennsylvania and Connecticut were able to take advantage of a great value proposition: numerous high-profile MLB games provide to fans for the comparatively low cost of the Section 111 license fees. Similarly, the ability to affordably retransmit WJZ's Maryland Terrapin basketball and Baltimore Orioles baseball games throughout the Mid-Atlantic region helped keep subscribers on the platform.

23. Furthermore, nationally televised games on Fox, such as the MLB Game of the Week, MLB playoffs, weekly NFL games, and college football games were an important reason to carry Fox on a distant basis. Sports fans expect to have access to these games, even if they do not have access to a local Fox signal.

24. Given the high value of live professional and collegiate team sports, MVPD programmers are willing to pay far more to carry this programming than other types of programming—including other “sports related” content. ESPN and RSNs are the most expensive programming that MVPDs carry. MVPD programming executives are willing to pay more for

ESPN than any other network because of its NFL<sup>7</sup>, NCAA<sup>8</sup>, MLB<sup>9</sup>, and NBA<sup>10</sup> games. Likewise, RSNs command significant license fees because of their JSC programming. ESPN paid billions of dollars every year for this live professional and team sports content precisely because they knew it would ensure that MVPDs would pay top dollar to carry ESPN. The importance of these live team sports is well understood in the industry; as one report concerning the most recent ESPN-NBA deal explained, “ESPN’s revenue is driven by live sports.”<sup>11</sup> Similarly, TNT is the most expensive general entertainment network, as it has paid billions of dollars for the NBA and NCAA March Madness games, which is its premier programming that distinguishes it from its competitors USA and FX, and drives up the amount MVPDs pay for the service.

25. As an MVPD programming executive, I never made the decision to carry these most expensive services at a time of increasing margin evaporation based on anything other than their live professional and collegiate team sports content. In fact, this programming was so central to these networks’ value that MVPD programming executives routinely negotiated provisions in carriage agreements that would automatically reduce the cost of carriage if these services lost their rights to exhibit professional or collegiate sports. There are no similar provisions applicable to

---

<sup>7</sup> Sandomir, Richard, “ESPN Extends Deal with N.F.L. for \$15 Billion,” N.Y. Times (Sept. 8, 2011), <https://www.nytimes.com/2011/09/09/sports/football/espn-extends-deal-with-nfl-for-15-billion.html> (\$1.9 billion per year for Monday Night Football).

<sup>8</sup> Shaw, Lucas, “ESPN, NCAA extend deal through 2023-24,” Reuters (Dec. 15, 2011), <https://www.reuters.com/article/us-espn-ncaa/espn-ncaa-extend-deal-through-2023-24-idUSTRE7BE2FM20111215> (\$500 million per year for certain NCAA championship games, not including March Madness).

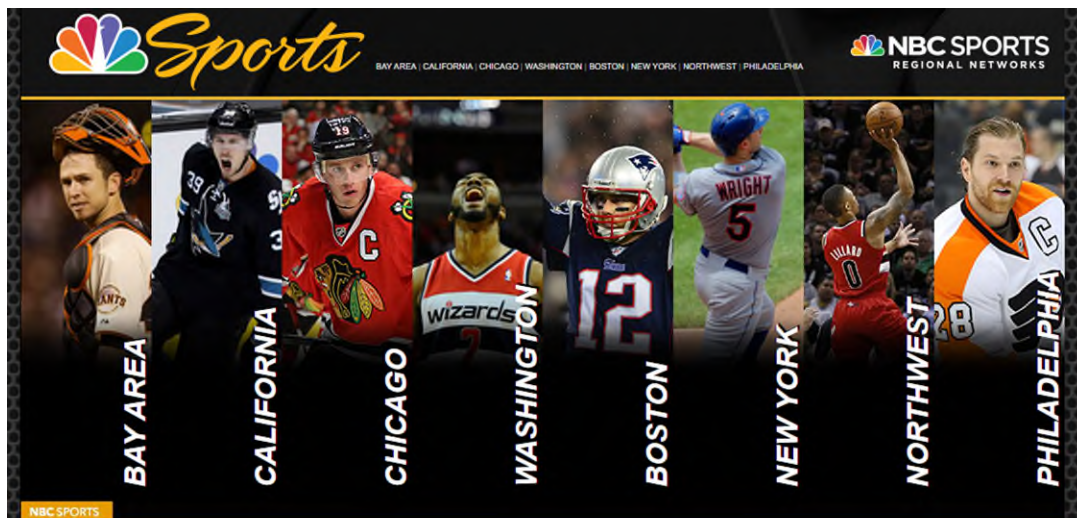
<sup>9</sup> Sandomir, Richard, “ESPN Extends M.L.B. Deal, Doubling What it Pays Yearly,” N.Y. Times (Aug. 29, 2012) <https://www.nytimes.com/2012/08/29/sports/baseball/espn-extends-deal-with-mlb-through-2021.html> (\$5.6 billion dollar deal for MLB games in 2014-2021 period).

<sup>10</sup> Gaines, Cork, “The Big Reason ESPN Will Pay the NBA \$1.4 Billion Every Year to Broadcast Games,” Business Insider (Oct. 7, 2014), <https://www.businessinsider.com/espn-nba-broadcast-games-deal-2014-10>

<sup>11</sup> *Id.*

any other category of content, whether it is “sports related” or not, because the other content is significantly less material to the MVPD’s bottom line and less expensive.

26. The importance of live professional and collegiate team sports on RSNs is further demonstrated by how RSNs advertise their own content. As of March 2020, this was the main page for NBC Sports’ RSNs:<sup>12</sup>



Each NBC Sports RSN in this image promotes its content by displaying an image of a “big four” professional sports team it carries; for example, NBC Sports Washington displays an image of John Wall, of the NBA’s Washington Wizards. Likewise, Fox’s RSN website, as of March 2020, also advertised each RSN exclusively by identifying the live professional and collegiate team sports content that each network carries.<sup>13</sup> For instance, as shown in the following excerpt, Fox Sports Oklahoma is associated with the NBA’s Oklahoma City Thunder and the NCAA’s Oklahoma Sooners:

<sup>12</sup> NBC Sports Regional Networks, <http://www.comcastsportsnet.com/> (last accessed Mar. 15, 2016).

<sup>13</sup> Fox Sports Regional Sports Networks, <https://www.foxsports.com/regions> (last accessed Mar. 15, 2016).



27. These RSNs do carry other “sports-related” content, including sports news programming and highlight shows. Some occasionally carry amateur non-collegiate team sports events like high school football. They do not focus their promotional efforts on this content, however, because its value is minimal.

#### **IV. MVPD Programming Executives Do Not View Other Sports and Sports-Related Content Similar To Live Professional and Collegiate Team Sports**

28. MGC’s proposed redefinition of the Joint Sports category would add numerous additional types of sports-related content to the category, including: (1) live telecasts of non-team sports events and non-college amateur sports; (2) rebroadcasts of games; (3) the Olympics and the U.S. Olympic trials; (4) sports highlights shows; and (5) sports broadcasts originating in Mexico.<sup>14</sup> Contrary to MGC’s unsupported argument, cable system operators see “an inherent difference” between live professional and collegiate team sports, on the one hand, and the other sports related programming that MGC seeks to wedge into the JSC definition on the other hand. That inherent

<sup>14</sup> Order Staying Proceeding Pending Rulemaking, Docket No. 16-CRB-0009 CD (2014-17), at 3 (Dec. 20, 2019). I understand that tape-delayed telecasts of live professional and collegiate team sports events have historically been categorized by the parties as within the current Joint Sports category definition, as have telecasts of FIFA World Cup soccer matches on U.S. commercial signals.



difference goes to the fact that live professional and collegiate sports, but not the other sports-related programming, are better able to attract and retain subscribers. During my multiple decades as a cable system operator programming executive, I did not decide to carry a distant signal, or any other station, based on the presence on non-JSC sports-related content. That is because I did not run the risk of losing subscribers if I did not carry such programming. However, I frequently felt I had to carry distant and non-distant signals solely due to the presence of JSC programming. MGC's argument reflects a fundamental misunderstanding of how cable system operators decide what programming to carry and how much to pay for it.

29. Shoulder Programming Is Not Similar to JSC Programming. "Shoulder programming" such as sports highlight shows and rebroadcasts of old games (like a classic college football bowl game from the 1990s) are simply "filler," and much more akin to news programming and general entertainment programming, respectively, than they are to live team sports. Both lack the tune-in, appointment viewing status of live sports, and in my experience cable customers did not view them as equivalent for the live games themselves but as a companion to introduce or wrap up the important live event. I do not recall ever considering a threat of subscriber loss as a result of choosing not to carry this programming. Even though this type of shoulder programming constitutes a substantial volume of what is shown on RSNs, cable system operators are not paying premium dollars for such programming. Rather, they are paying the premium rates for the live professional and collegiate team sports.

30. While I was at Comcast in the 2000s, I helped to create many of the NBC RSNs. Even then, we considered this shoulder programming to be merely "filler" that helped to round out the broadcast schedule when we could not show a live professional or college team sports event. Today, many RSNs have cut back on the amount of "shoulder programming" that they produce,

because they understand that it simply adds an expense for which they are not likely to be compensated by MVPDs.

31. The same is the case for ESPN. MVPDs pay ESPN, along with RSNs, the highest per subscriber fees due to the presence of live professional and collegiate team sports. While many people may like SportsCenter, it does not drive the decision to carry ESPN or to pay premium rates for ESPN. If ESPN did not carry live professional and collegiate team sports, cable system operators would only pay a fraction of the going rate for the network.

32. Individual Sports Are Not Similar to JSC Programming. Similarly, the category of “individual sports” includes a widely varied mix of sports (golf, swimming, running) and quasi-sports (“ninja” and “warrior” races, professional wrestling) that are not viewed as equally valuable to live professional and team sports programming.<sup>15</sup> These sports do not generate the depth of subscriber interest and passion that presents a risk of significant subscriber loss if an MVPD chose not to carry them. The competitors in these sports also do not represent specific geographic markets, which decreases fan loyalty and interest. These “individual” sports do not drive CSO programming decision-making because they do not have the power to materially retain or attract subscribers in the way that JSC programming does.

33. Cable networks that focus on non-team sports content are far cheaper to carry than RSNs and other sports networks that carry live professional and collegiate team sports. In recent years, carrying a cable network such as the Tennis Channel has not cost even one-tenth of what it costs to carry a typical RSN.<sup>16</sup>

---

<sup>15</sup> I testified to this in the 2010-13 cable proceeding, as did former DirecTV programming executive Daniel Hartman. See Written Rebuttal Testimony of Allan Singer, at ¶¶ 8, 11-13 (Sept. 15, 2017) No. 14-CRB-0010-CD (2010-13); Written Rebuttal Testimony of Daniel M. Hartman, at ¶ 36 (Sept. 15, 2017), No. 14-CRB-0010-CD (2010-13).

<sup>16</sup> Exhibit C, Declaration of Dr. Andrew Dick, at ¶ 49.

34. Non-Collegiate Amateur Team Sports And Team Sports Originating In Mexico Are Not Similar To JSC Programming. There is some team sports programming that is not within the current Joint Sports category definition, and would fall within the category if MGC's definition were adopted. Specifically, this includes live team sports telecasts originating in Mexico and non-college amateur sporting events, such as high school sports and the Olympics. However, programming in these categories that is carried on distant signals is not highly valuable, and is (with one exception discussed below) not viewed as similar to JSC programming.

35. Non-college amateur sports programming is a large bucket of typically very low value content. Much of this content is high school sports programming, which receives minimal subscriber attention. The subscribers who are likely to feel most passionate about this programming are the parents of high school students, and these parents frequently prefer to attend the games in person, which they can do at little or no cost. I do not recall ever analyzing the value of high school sports content on a distant signal, much less deciding to carry a signal because of it.

36. With respect to Olympic programming, most of this content is not compensable under the Section 111 license because it is NBC network originated programming. A cable system would not import a distant NBC signal for duplicative network programming. Additionally, cable system operators do not view the Olympics as playing a similar role in programming decision-making because the Olympics only occur every other year for a few weeks, and are therefore in the nature of a "special."

37. Finally, stations originating in Mexico are only rarely carried under the Section 111 license. In total, only five Mexican broadcast signals were carried on a distant basis in each of the

2014-17 royalty years, and none was carried on a distant basis by more than one cable system.<sup>17</sup> In fact, in throughout the 2014-17 period, only three cable systems in the entire country chose to carry Mexican signals: (1) a Time Warner system in Pharr, Texas; (2) a Time Warner system in Winterhaven, California; and (3) a Comcast system in Albuquerque, New Mexico.<sup>18</sup> Mexican signals are simply not widely carried under the Section 111 license.

38. Moreover, a substantial portion of the value of the programming on Mexican signals is likely driven by other unique aspects of the programming on these signals. The three cable systems that retransmit these stations serve communities in the southwestern United States,<sup>19</sup> and likely import the signals not only for the live professional, team sports programming, but also to provide Spanish-language programming to Spanish speaking households in their community. Therefore, of the minimal amounts in royalties paid to carry these signals, I would expect an even smaller amount to be properly attributable to the carriage of the live team sports programming on those signals.

39. For all of these reasons, there is an inherent difference between live professional and collegiate team sports and the other sports-related programming that MC seeks to include in the JSC definition. JSC programming plays a critical role in cable system operators' decision-making and as a result has a distinct value proposition that is not found in the other sports-related content.

## **V. The Current Non-JSC Program Categories are Also Consistent with MVPD Decision-Making Processes**

40. While MGC focuses in particular on the definition of the sports category, I understand that the Judges' inquiry concerns the adequacy of the definitions for all claimant

---

<sup>17</sup> Exhibit E, Declaration of William E. Wecker, Ph.D. and R. Garrison Harvey, at ¶ 10.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

categories. As a programming executive, I view the non-JSC claimant category definitions as sufficiently consistent with MVPD decision-making processes for purposes of assigning relative marketplace value to each category. Each group is comprised of programming that plays similar roles in MVPD decision making process.

41. MVPD programming executives generally group together “general entertainment” programming, such as syndicated sitcoms, old movies, and other “specials,” when making programming decisions. Most of this content—especially the subset that is carried on distant signals—is non-distinct, nonexclusive programming that viewers enjoy watching on various networks and platforms, and are for the most part not exclusively associated with a specific network such that the presence of that content on a network is an important reason to maintain their overall pay TV subscription. Therefore, it makes sense that these programs are grouped together within the Program Suppliers category.

42. Likewise, it is consistent with MVPD decision-making to group together station-produced programming in the Commercial Television category. As a programming executive, I understood it was often important to have the local news programming that appealed to a particular geographic area, and valued that programming distinctly from nationally-distributed news programming.

43. With respect to the programming in the Public Television category, as a programming executive I understood that non-commercial, ad free programming had an appeal to a particular subscriber subset who valued that programming as an alternative to standard commercial fare.

44. Canadian Claimants programming, which is only retransmitted near the Canadian border, appeals to subscribers in those parts of the country who have a connection to Canada,

including subscribers who speak French. This subgroup of subscribers appreciates programming specifically because of its Canadian origin, and it therefore makes sense to group this programming together.

45. Finally, with respect to the Devotional Category, there is a small group of cable subscribers who desire religiously-themed programming, including Sunday morning worship services. While these are not a significant portion of overall cable subscribers, it is nevertheless valuable to have programming that appeals to this group.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 13, 2020.

  
Allan Singer

# **Appendix A**



## **ALLAN SINGER**

1051 S. Ogden Street  
Denver, Colorado 80209

(215) 375-4416  
allansinger@comcast.net

---

### **PROFESSIONAL EXPERIENCE**

#### **INDEPENDENT CONSULTANT**

Winter 2017 to present

Since leaving Charter, I consulted for GLG, Third Bridge and various independent investment groups; as well as serving as a full time consultant to YES Network management and Yankee Global Enterprises on the repurchase of YES Network from Fox and various distribution matters; AT&T/DirecTV as an endorsed expert in a litigation matter; other expert witness retentions; and with various additional programming services.

#### **CHARTER COMMUNICATIONS, INC.**

Senior Vice President, Programming  
March 2011 to September 2016

As Senior Vice President, Programming, at Charter Communications I headed the company's programming department and reported to Charter's CEO. I was responsible for managing all aspects of Charter's acquisition of video content; including negotiating carriage agreements with large media companies and independent networks, evaluating carriage of cable channels, acquiring video on demand and library offerings from various content companies, developing the budget and long-range plan for the company's largest expense, examining business models for new packages and different distribution modalities, and in managing the department. I was also involved in the various M&A activities in which the company was involved during this time period, and was part of the senior management team that transformed Charter into an extremely successful company.

#### **OPRAH WINFREY NETWORK, LLC**

Executive Vice President, Distribution and Strategy  
November 2009 to March 2011

At the Oprah Winfrey Network (OWN), I lead the transition from Discovery Health to OWN, was involved in the strategy surrounding OWN's launch and supervised US distribution, digital distribution and overseas distribution agreements. I created OWN's license fee structure and worked closely with OWN's Board to implement our distribution strategy, prepared affiliate marketing materials, presented the Network to distributors and negotiated all agreements. I was responsible for the most successful new network launch in the last fifteen years, increasing distribution and establishing a healthy affiliate revenue stream.

#### **COMCAST**

Senior Vice President, Content Acquisition

June 2007 to October 2009

As Senior Vice President, Content Acquisition, at Comcast I was responsible for acquiring network distribution rights with content providers on behalf of the largest multichannel distributor. My responsibilities included negotiating content agreements with media companies for distribution of their cable networks, VOD and broadband content and other new media initiatives. I was also involved in examining and effectuating programming strategies for Comcast.

Senior Vice President, Business Development, Sports  
June 2006 – June 2007

In this position, I was responsible for securing sports rights across various distribution and technology platforms, with particular emphasis on acquiring these rights for Comcast's regional and national sports networks. I also helped develop Comcast's regional and national sports strategy. I was the lead negotiator in the acquisition of National Hockey League rights for the exhibition of games on linear television, streaming, VOD and broadband rights for Comcast and VS, and was on the Comcast team that negotiated with the NFL.

Senior Vice President, Programming Investments  
March 2003 – June 2006

Comcast's former programming investments department was responsible for managing and expanding Comcast's network portfolio. Our department evaluated numerous acquisition opportunities of media companies, networks and strategic rights acquisitions. It acquired TechTV and combined it with our G4 Network, growing that network from 17 to 52 million subscribers. We developed and launched TV One and PBS Kids Sprout. I was also responsible for the supervision of the various Comcast networks' affiliate sales and marketing departments, and entered into affiliation agreements on their behalf with various cable and DBS providers. I also led the rights negotiations that resulted in the creation of Comcast SportsNet Chicago, obtained the rights to Sacramento Kings' games resulting in the development of Comcast SportsNet West and negotiated the rights and affiliation agreements that created SportsNet New York.

**AT&T BROADBAND, LLC**  
(formerly **Tele-Communications, Inc.**)

Senior Vice President, Programming  
President, Satellite Services, Inc., 2001 - 2003  
1996 - 2003 (SVP, 2001 – 2003, Vice President 1997 - 2001, Director 1996)

As Senior Vice President of Programming at AT&T Broadband and President of Satellite Services, Inc., its content acquisition subsidiary, I lead rights acquisition negotiations with content providers for the nation's then largest cable television company. In this capacity, my department completed programming agreements with a variety of media companies for the distribution of cable and broadcast networks, movie studios and pay-per-view events and sports content. I negotiated complicated rights transactions, drafted and reviewed sophisticated contracts, evaluated equity positions, developed and initiated long-term strategy goals and analyzed the financial ramifications of long-term programming obligations. I also worked with the company's marketing department to assist in cooperative promotional relationships with other media companies and facilitated the implementation of programming decisions by our local business operations.

**WHITE AND STEELE, P.C.**

Partner 1994 - 1996

Associate 1987 - 1993

I was a partner with White and Steele, at the time the twelfth largest law firm in the Rocky Mountain region. At White and Steele, I tried cases in district courts throughout Colorado where I primarily defended professional negligence cases for attorneys, accountants and health care providers. I briefed and argued cases before the Colorado Supreme Court and other appellate courts, and assisted licensed professionals in matters before their disciplinary boards and regulatory agencies.

**FIERST AND CHRISTOPHER, P.C.**

1986 - 1987

**HOLMES AND STARR, P.C.**

1985 - 1986

General associate attorney duties at these firms.

**CHIEF JUDGE DAVID ENOCH, COLORADO COURT OF APPEALS**

Judicial Clerk 1984 - 1985

**EDUCATION****JURIS DOCTOR, UNIVERSITY OF COLORADO, Boulder, Colorado 1984****BACHELOR OF ARTS, DICKINSON COLLEGE, Carlisle, Pennsylvania 1981**

-Magna Cum Laude

-Phi Beta Kappa

-Varsity letterman in lacrosse in each of my three years at Dickinson

-Attended Hatfield College, Durham University, England, junior year

**BOARD MEMBERSHIPS and ORGANIZATIONS**

-Board Member, Rocky Mountain Public Media

-Board Member, Silicon Valley Flatirons, 2017- present

-University of Colorado School of Law Dean's Advisory Committee, 2014-2106

-Board Member, Make A Wish of SE Pennsylvania 2006 to 2009

-Board Member, iN Demand, 2001 - 2002

-Board Member, Colorado Special Olympics of Colorado 2000 - 2003

-Board of Directors, Forest Hills Metropolitan District, 1994 - 1996

-Colorado Bar Association Ethics Committee, 1990 - 1993

**ACTIVITIES**

I enjoy tennis, skiing, guitar, reading and spending time with my two sons.

## **Exhibit B - Declaration of Daniel Hartman**

Before the  
**COPYRIGHT ROYALTY JUDGES**  
The Library of Congress

*In re*

**NOTICE OF INQUIRY REGARDING  
CATEGORIZATION OF CLAIMS FOR  
CABLE OR SATELLITE ROYALTY  
FUNDS AND TREATMENT OF  
INELIGIBLE CLAIMS**

**Docket No. 19-CRB-0014-RM**

**DECLARATION OF DANIEL HARTMAN**

**MARCH 16, 2020**

## **I. Qualifications**

1. I have twenty years of experience in the satellite television business as an executive responsible for the valuation and acquisition of television programming, including fifteen years in that capacity at DirecTV, the nation's largest satellite television provider. I am currently President of Hartman Media Consultants, providing consulting services for various media clients, including content owners, cable television networks, program distributors and investors in television programming distribution.

2. I started my career in October of 1989 as a corporate attorney at O'Melveny & Myers in Los Angeles, CA. In February of 1995, I accepted a position as Senior Counsel, Legal Affairs for Fox Broadcasting Company where I served as lead attorney for the Fox Sports group. I also served as legal counsel for the Fox broadcast television network.

3. In February 1998, I took a position as Assistant General Counsel, Business and Legal Affairs at DirecTV, where I spent two years negotiating agreements for carriage of programming on DirecTV. In April of 2000, I joined the Programming Acquisitions department at DirecTV and became Senior Director, serving in a strictly business role. I remained at DirecTV until January 2013, having been promoted to Senior Vice President of Programming Acquisitions in 2007. In that capacity, I was responsible for DirecTV's program acquisition activities for its more than eighteen million customers with respect to all general entertainment and premium cable networks (and thus their programming), as well as initiatives such as video-on-demand programming and the development of DirecTV's "TV Everywhere" platform. My responsibilities included negotiating the terms of carriage for that programming which entailed analyzing and determining the amounts DirecTV would be willing to pay for such programming. Such duties also included overseeing sports programming negotiations (*e.g.*, carriage term for regional sports

networks (“RSNs”) and out-of-market sports packages such a NBA League Pass) as well as the strategy and negotiations with respect to broadcast and local television stations.

4. During my tenure at DirecTV, I served as a board member of The Tennis Channel from 2007 through 2012, where my duties included providing guidance on channel strategy and distribution. I have also served on the board of the Los Angeles Sports Council and the Southern California Committee for the Olympic Games since 2008.

5. At DirecTV I worked regularly with the CEO and other senior executives as lead strategist with respect to pricing and packaging of content as well as budgeting and forecasting of programming costs. I was closely involved in the selection of channels for DirecTV (including programming carried pursuant to the Section 119 license). The selection of channels to launch (and subsequent decisions on whether to maintain them) required in-depth cost/benefit analysis. Throughout my tenure at DirecTV, I negotiated hundreds of programming distribution agreements covering all types of content. Thus, I gained insight into the variety of programming available to multichannel video programming distributors (“MVPDs”) and the rationale for carriage. My responsibilities required me to be familiar with the types of programming being offered by DirecTV’s competition as well as the value of, and fair market price for, that programming.

6. I have attached a copy of my resume as Appendix A.

## **II. Introduction and Summary**

7. I understand that the Judges seek “input into how the Allocation Phase categories should be defined.”<sup>1</sup> In particular, “[t]he Judges understand ... that if the effect of the stipulated categories is to aggregate programs within categories in a manner inconsistent with the cable system operators’ usual decision making process, the valuation process may be affected

---

<sup>1</sup> Notice of Inquiry Regarding Categorization of Claims for Cable or Satellite Royalty Funds and Treatment of Ineligible Claims, 84 Fed. Reg. 71582, at 71583 (Dec. 2019) (“Notice of Inquiry”).

adversely.”<sup>2</sup> I am submitting this testimony in order to explain the MVPD decision-making process, which I believe aligns well with the long-standing Allocation Phase claimant category definitions, and particularly with the historical definition of the Joint Sports Claimants (“JSC”) category.

8. In order to determine what programming to carry, where to carry it, and how much to pay for it, programming executives are all considering the same fundamental question: how to attract and retain subscribers. Subscriber fees make up the overwhelming majority of MVPD revenue, and the primary job of an MVPD’s programming department is to obtain the content that attracts subscribers to, and keeps them on, the platform. The Allocation Phase categories, as historically defined, do a good job of distinguishing between categories of content that appeal to different subscriber groups, as well as between categories of programming that are more or less important to attracting and retaining subscribers.

9. This is most clearly the case with the current definition of the JSC category, which includes live professional and collegiate team sports programming. As an MVPD programming executive, I considered JSC programming to appeal more strongly to subscribers than any other category of content, including other types of sports-related content. Subscribers feel passionate about live professional and collegiate team sports programming, and there is a substantial risk of subscriber losses if an MVPD chooses not to carry this programming. For this reason, I typically paid far more to carry JSC programming than other types of content, including other types of sports content.

10. Multigroup Claimants’ (“MGC”) argument that the definition of the JSC category should be revised to include all “programming of a predominantly sports nature” is based on a

---

<sup>2</sup> Notice of Inquiry at 71853.



misunderstanding of the MVPD industry.<sup>3</sup> MVPD programming executives do not assign value to programming on a rote basis by fitting it into broad categories like “sports” or “drama” or “news.” Instead, they differentiate between programs based on their understanding of how different types of content appeals to subscribers. Programming “of a predominantly sports nature” includes, in addition to live professional and collegiate team sports, rebroadcasts of old games; sports highlight shows, individual sports like golf, ice skating, and boxing; and non-collegiate amateur team sports including high school sports, the Olympics and U.S. Olympic trials.<sup>4</sup> This non-JSC sports-related content did not play the same role in my decision making regarding what programming to carry and how much to pay for it, because it did not have the same power to attract and retain subscribers. I did not fear subscriber losses when I chose not to carry this programming. When I chose to carry a cable network that featured non-JSC sports-related content, such as the Tennis Channel, I paid far less than I did for channels featuring live professional and collegiate team sports. And, particularly relevant to this proceeding, my decision to retransmit a distant signal focused on whether the distant signal carried JSC professional and collegiate team sports programming not non-JSC sports-related content.

11. If the Judges were to adopt MGC’s proposal, I believe it would be more difficult to value JSC programming overall, because of the significant differences between live professional and collegiate team sports programming and non-JSC sports-related content. The new category would add a large, undefined amount of content that would be extremely unwieldy to value.

12. The other historical definitions of the Allocation Phase categories also align with MVPD decision-making. Each Allocation Phase claimant category is comprised of programming

---

<sup>3</sup> MGC Comments on Claimant Category Definitions and Proposed Modification, at 15-16 (Apr. 19, 2019) (“MGC Comments”).

<sup>4</sup> Order Staying Proceeding Pending Rulemaking at 3, 16-CRB-00009-CD (2014-2017).

that shares a common appeal to subscribers and therefore is viewed similarly by programming executives.

### **III. Live Professional And College Team Sports Is A Distinctive Category Of Sports Programming**

13. MVPD executives view programming through the lens of its ability to attract and retain subscribers. Subscriber revenue is the lifeblood of the MVPD industry, and MVPDs are under increasing pressure to keep the subscribers they have in an era of cord-cutting. MVPDs have understood for years that the most important programming to carry in order to attract and retain subscribers to their platforms is the live professional and college team sports that currently comprises the Joint Sports category.<sup>5</sup> Given the distinctive status of this programming in the eyes of MVPDs and their subscribers, it accords with MVPD decision making to treat JSC programming as its own claimant category.

14. Live professional and college team sports programming is a “one-of a kind” experience that subscribers want to watch in real time. Team sports fans are especially passionate subscribers and expect that their pay-TV service will provide access to their favorite teams’ games. MVPDs know that many professional and collegiate sports fans feel a connection to their team(s) that is about more than sports. Many fans closely follow their favorite team not only because they enjoy the games, but because doing so gives them a sense of community.<sup>6</sup>

---

<sup>5</sup> See Corrected Written Direct Testimony of Daniel Hartman, 14-CRB-0011-SD (2010-13) (June 7, 2019) (“Hartman Satellite WDT”) at ¶¶ 11-12; Written Rebuttal Testimony of Daniel Hartman, 14-CRB-0011-SD (2010-13) (Aug. 26, 2019) (“Hartman Satellite WRT”) at ¶¶ 10, 17; Written Direct Testimony of Daniel Hartman, No. 14-CRB-0010-CD (2010-13) (“Hartman 2010-13 Cable WDT”) (Dec. 20, 2016), at ¶¶ 20-21, 24, 25; Written Rebuttal Testimony of Daniel Hartman, No. 14-CRB-0010-CD (2010-13) (“Hartman 2010-13 Cable WRT”) (Sept. 15, 2017), at ¶¶ 10-11, 36.

<sup>6</sup> Terry Lefton, *What drives team loyalty?*, Sports Business J. (Oct. 12, 2015) <https://www.sportsbusinessdaily.com/Journal/Issues/2015/10/12/In-Depth/Fan-study.aspx>;

15. This programming shares several additional important characteristics that distinguish it from other types of sports-related content. *First*, for some subscribers, MVPDs cannot suggest that they watch a different game, team, or sport if a particular game is not available.<sup>7</sup> Passionate fans of the New York Mets will not accept New York Yankees games as an alternative, nor will a University of Georgia alum accept an Auburn game as an alternative. *Second*, this programming is exclusive; live team sports events are generally offered only on a single linear channel, and an MVPD that chooses not to carry such a channel risks losing those subscribers who expect access to the live professional and collegiate team sports programming it offers. *Third*, live professional and collegiate team sports programming is overwhelmingly consumed when it first airs, making it one of the last forms of programming resistant to time-shifting. Given these characteristics, it is not surprising that MVPD programming executives have repeatedly testified to the distinctive value of live professional and collegiate team sports.<sup>8</sup>

---

<sup>7</sup> See Oral Testimony of Daniel Hartman, 2010-2013 Cable Transcript at 3148: 12-22 (“I can’t tell you to watch another team or another sport because I just don’t think – you know, again there are many general sports fans, but if you’re a true fan of a team or teams, I can’t tell you to watch another – a different game.”).

<sup>8</sup> See, e.g. Testimony of Jerry Maglio, CRT Dkt. No. 92-1-90 CD (1990) at 9 (Aug. 16, 1993) (“There are several reasons that the cable industry perceived sports programming on distant signals are the most valuable distant signal programming . . . Sports programming is new and non-repetitive and highly promotable.”); Testimony of Trygve Myhren, 94-3 CARP-CD 90-92 (1990-92) at 3 (Aug. 15, 1995) (“I believe that the cable industry considered sports programming to be the most valuable programming on distant signals during the years 1990 through 1992”); Testimony of James P Mooney, 94-3 CARP-CD90-92 (1990-92) at 2-3 (Aug. 18, 1995) (“[I]t is my opinion that cable operators value distant signals, including “superstation,” principally for their telecasts of major league sporting events.”); Testimony of Judith Meyka, at ¶ 20, 2007-3 CRB CD-2004-2005 (2004-2005) (June 1, 2009) (“It has long been the case that live sports programming is the most expensive programming purchased by cable operators.”); Written Direct Testimony of Allan Singer, 2010-13 Cable, No. 14-CRB-0010-CD (2010-13) (Dec. 22, 2016) at ¶ 15 (“When considering the carriage of a distant signal, the presence of live team sports programming is primarily what differentiates the signal. [ . . . ] Sports programming is the most expensive programming on a cable system precisely because in many instance without it a CSO will lose customers.”); *id.* at ¶ 29 (citing past testimony to state that “[a]lthough the MVPD industry has evolved significantly over time, the central points made in the testimony of these cable industry

16. It is for this reason that DirecTV has long spent very large sums to carry NFL Sunday Ticket on an exclusive basis. NFL Sunday Ticket is a package that provides access to all out-of-market NFL regular season live game telecasts to DirecTV subscribers on Sunday afternoons. DirecTV offers this package to subscribers for a fee of up to \$395 per season in addition to their regular bill. As of March 2020, DirecTV offers a free season of Sunday Ticket to anyone who will switch from their current pay TV provider to DirecTV.<sup>9</sup> It is widely understood in the MVPD industry that Sunday Ticket is important to attracting and retaining subscribers to the DirecTV service, and DirecTV makes this product a cornerstone of its fall advertising campaigns. DirecTV does not engage in any comparable marketing efforts involving non-team sports or any other non-JSC sports-related content.

17. The presence of live professional and collegiate team sports programming is a key factor in the decision to carry a distant signal. Many collegiate and professional sports teams have robust fan bases that are not neatly confined to a single Designated Market Area (DMA).<sup>10</sup> As a programming executive, I used distant signals to provide live professional and collegiate team sports programming to fans who would not otherwise be able to watch their favorite teams' games on local signals. For example, under the Section 119 license, DirecTV provided ABC, CBS and NBC affiliates to "unserved" communities that did not have a local signal from one of those broadcast networks. Sports fans in these markets relied on these imported signals to access live professional and college team sports programming—for example, NFL Sunday afternoon telecasts

---

executives about the value of sports programming, both generally and in the context of distant signals, remain true today.”)

<sup>9</sup> <https://www.directv.com/sports/nfl>, last accessed March 7, 2020.

<sup>10</sup> See, e.g. Tom Giratikanon, Josh Katz, David Leonhardt, Kevin Quealy & Mark Tracy, *NCAA Fan Map: How the Country Roots for College Football*, N.Y. Times (updated Oct. 3, 2014), <https://www.nytimes.com/interactive/2014/10/03/upshot/ncaa-football-fan-map.html>.

and NCAA tournament games on CBS and NBA playoff games on ABC. These sports programs were the primary reason I carried distant network signals in unserved markets when I was in making programming decisions at DirecTV.

18. In recent years, live team sports has helped to differentiate MVPDs from newer “over-the-top” (“OTT”) services such as Netflix, Amazon, and Hulu. Although some OTT platforms began to acquire rights to livestream a limited number of professional and collegiate team games in 2016 and 2017, the availability of professional and collegiate team sports programming from non-traditional platforms has typically been the exception, rather than the rule.<sup>11</sup> Consistent access to sports programming, especially for fans of particular teams and for high-profile events like playoff games and the March Madness tournament, remained a powerful tool for MVPDs to attract and maintain subscribers and to prevent cord-cutting.<sup>12</sup>

19. The rights fees paid by broadcast and cable networks during the period to carry live team sports events also confirm the distinctive characteristics of professional and collegiate team sports programming. In fact, cable networks featuring JSC programming are the most expensive cable networks to carry. ESPN, which was recently estimated to cost \$7.69 per subscriber to carry, is the most expensive cable network in the country.<sup>13</sup> At DirecTV, we were willing to pay the very high rates for ESPN and RSNs solely because of the MLB, NFL, NBA and NCAA content it

---

<sup>11</sup> Claire Atkinson, *Game On: Facebook, Google and Amazon are coming for your TV sports*, NBC News (March 15, 2018), available at <https://www.nbcnews.com/tech/internet/game-facebook-google-amazon-are-coming-your-tv-sports-n856906>.

<sup>12</sup> Chris Brantner, *Cord cutting is easier and better than ever, but it's not the right choice for every TV fan*, Tech Hive (July 26, 2017), available at <https://www.techhive.com/article/3209925/cord-cutting-is-easier-and-better-than-ever-but-its-not-the-right-choice-for-every-tv-fan.html>; Hasib Ewoldt, *Why more folks aren't cutting the cord on cable TV*, Star Tribune (Oct. 18, 2016), available at <http://www.startribune.com/why-folks-aren-t-cutting-the-cord-on-cable-tv/397326141/>. See also Hartman 2010-13 Satellite WDT at ¶ 18; Hartman 2010-13 Satellite WRT at ¶ 33; Shull 2010-13 Satellite WDT at ¶¶ 22-23.

<sup>13</sup> Exhibit C, Declaration of Dr. Andrew Dick (“Dick Decl.”), at ¶ 49.

offered, and not various “shoulder programming” such as sports highlight programs or non-JSC individual and non-collegiate amateur sports.

20. Because cable networks know that they can charge higher carriage fees if they carry live professional and collegiate team sports programming, they are willing to pay far more for the rights to that programming than for any other category of content. For example, when Dr. Mark Israel reviewed TNT and TBS’s payments for the rights to JSC programming during the 2010-13 period, he found that these networks spent 44-46% percent of their budgets on JSC programming, notwithstanding that it only constituted 2-3% of the programming they carried.

Network	Category	Total Programming Hours	Total HHVH (000)	Expenditures (\$M)	Expenditures per Hour of Programming	Expenditures per Hour of Viewing
		[A]	[B]	[C]	[D] = [C] / [A]	[E] = [C] / [B]
TBS	JSC	684.0	1,220,722.6	\$1,031.0	\$1,507,370.6	\$0.845
	Non-JSC	34,356.0	20,880,757.4	\$1,291.2	\$37,581.7	\$0.062
	JSC / Non-JSC	0.02	0.06	0.80	40.11	13.66
	JSC % of Total	1.95%	5.52%	44.40%		
TNT	JSC	977.0	2,513,281.9	\$2,042.0	\$2,090,056.2	\$0.812
	Non-JSC	34,063.0	29,162,878.1	\$2,450.2	\$71,931.9	\$0.084
	JSC / Non-JSC	0.03	0.09	0.83	29.06	9.67
	JSC % of Total	2.79%	7.93%	45.46%		

See Written Rebuttal Testimony of Mark Israel, Ph.D., at Table 10, No. 14-CRB-0010-CD (2010-13) (Sept. 15, 2017).

21. Likewise, in light of the significant expense associated with carrying sports networks, MVPDs seek protections that ensure they actually receive the live professional and collegiate team sports programming they are bargaining for. At DirecTV, when we carried an RSN, we required the RSN to guarantee that it would continue to provide JSC programming. Our contracts required the RSN to rebate part of the carriage fee if it materially reduced the amount of JSC programming. Further, should the RSN cease carrying a particular team’s games (for example, if Fox Sports Oklahoma lost the rights to University of Oklahoma programming), we

would consider that a breach of contract. DirecTV did not seek similar guarantees regarding any other category of content.

#### **IV. MGC's Proposed "Sports Programming" Definition Does Not Align With MVPD Decision-Making**

22. MGC argues that there are no "inherent differences" between live professional and college team sports content and other types of sports-related programming, such as "(1) tape-delayed sports broadcasts; (2) rebroadcasts of games; (3) non-college amateur team sports; (4) FIFA World Cup football (soccer) matches; (5) Olympics and U.S. Olympic Trials; (6) individual sports (*e.g.*, golf, ice skating and boxing); (7) sports broadcasts originating in Mexico; and (8) sports highlight shows."<sup>14</sup> In support of their argument, MGC argues that each of these categories of content is equally "sporty."<sup>15</sup> This argument, whatever it means, misses the mark. As an MVPD programming executive, the mere fact that a program was somehow related to sports did not mean I viewed it in the same manner as I viewed JSC programming. While special programming like the Olympics and The Masters does have some value, this programming is infrequent and very rarely compensable in these proceedings. Further, non-JSC sports-related content is simply far less valuable to MVPDs because it does not play remotely the same role in attracting and retaining subscribers. The distinctive qualities that make live professional and collegiate team sports so important to MVPDs are missing from individual and non-collegiate amateur team sports and "sports-related" content like talk shows, highlight reels, and replays of past sporting events.

---

<sup>14</sup> See Stay Order at 3; MGC Comments at 15. I understand that MGC's suggestion that revising the definition of the Joint Sports category to include amateur sports would add live FIFA World Cup soccer matches to the category is incorrect. Live telecasts of FIFA soccer matches on U.S. commercial signals already fall within the JSC category. Likewise, I understand that in the most recent Allocation Phase proceeding, JSC categorized the small amount of distantly retransmitted tape-delayed sports broadcasts as JSC programming.

<sup>15</sup> MGC Comments at 15.

MVPD programming executives did not fear subscriber losses would result if they chose not carry programming that falls within this category.

**A. MVPDs Distinguish Between JSC Sports Programming and Non-Team Sports Content**

23. MGC's argument that "[n]o inherent difference exists that would suggest that broadcasts of *individual* sports . . . would be considered differently by a system operator than broadcasts of a 'team' sport" is at odds with my experience in the MVPD industry, and MGC does not provide any evidence for this assertion.<sup>16</sup> Non-team sports programming simply does not play the same role in attracting and retaining subscribers, and therefore is viewed differently by MVPDs. At DirecTV, it was JSC programming, and not non-JSC sports programming, that typically drove my decision to retransmit a distant signal. I knew that subscribers were far less likely to complain if they did not have access to this programming than if they lost access to JSC programming.

24. Non-team sports generally rely on rare generational stars to generate the kind of excitement and passion that team sports generates among its fan base on a regular basis. Interest in non-team sports content to large groups of subscribers can fluctuate dramatically depending on whether a single player, such as Serena Williams, is playing and enjoying individual success. Media commenters recognize that sports leagues that do not have teams, such as the Ultimate Fighting Championship, are at a disadvantage when competing in the marketplace for fans.<sup>17</sup>

25. For instance, tennis is generally considered to be distinct from the major live professional and collegiate team sports, and is not as valuable. As a member of the Board of

---

<sup>16</sup> MGC Comments at 10.

<sup>17</sup> See, e.g. Joe Chacon, *Can an Individual Sport Such as MMA Ever Be More Popular Than a Team Sport?*, Bleacher Report (June 18, 2012), <https://bleacherreport.com/articles/1225597-can-an-individual-sport-such-as-mma-ever-be-more-popular-than-a-team-sport>.



Directors of the Tennis Channel for five years, I can attest that the Tennis Channel had a significantly harder time than ESPN or RSNs getting widespread carriage. It also did not command significant carriage fees. This is because tennis does not generate the same level of subscriber passion as live professional and collegiate team sports do. In the sport of tennis, no American male player has been dominant for almost twenty years and the popularity of tennis in the U.S. has significantly suffered as a result.<sup>18</sup>

26. As discussed above, MVPDs generally require RSNs to commit to maintaining the rights to carry live professional or NCAA basketball or football games in their distribution agreements. There are penalties (including fee rebates or breach of contract) should the RSN materially reduce its number of live professional or collegiate games or cease carrying a particular professional or collegiate team's events. An RSN could not meet its contractual commitment by airing non-team sports content, such as golf or skiing, and I am not aware of any such protections for other sports programming aired on RSNs.

**B. JSC Sports Programming Is Not Comparable To Non-Collegiate Amateur Sports Programming**

27. MGC argues that “[n]o inherent difference exists that would suggest that non-college amateur sports would be considered differently by a system operator than ‘professional and college’ sports broadcast [*sic*].”<sup>19</sup> MGC’s proposed definition would add the Olympics and U.S. Olympic trials, as well as high school athletics, to the JSC category. Notwithstanding their connection to sports, these programs are not viewed by MVPD programming executives as close relatives of JSC programming. With respect to non-collegiate amateur sports like high school

---

<sup>18</sup> Merlisa Lawrence Corbett, *Why is American Tennis Dying?*, Bleacher Report (Nov. 21, 2013), <https://bleacherreport.com/articles/1857664-why-is-american-tennis-dying>.

<sup>19</sup> MGC Comments at 10.

football, these programs generally do not appeal strongly to subscribers or drive their subscription decisions. The Olympics are only televised for two weeks every other year, and therefore most subscribers are not as attached to these programs as they are to other categories of content.

28. NBC was the official broadcast partner in the United States for both the 2014 and 2016 Olympics. As a result, essentially all of the Olympics programming in these years was either an NBC network telecast (*i.e.*, broadcast on NBC stations) or on one of the NBC-owned cable networks (such as NBC SportsNet, CNBC and Telemundo).<sup>20</sup> Given that the Olympic broadcasts are generally carried on cable networks, or constitute NBC network programming, they are generally not compensable under the Section 111 license.<sup>21</sup>

29. Olympics programming is appropriately categorized as Program Suppliers content, because it is in the nature of a “special.” While the Olympics and Olympic trials are certainly sports events, they appear for only two weeks every other year, and the athletes competing frequently change between each Olympics. This reduces the passionate connection fans feel between themselves and the competitors. Few Americans are dyed-in-the-wool fans of, say, the U.S. Olympic Alpine Ski Team. By comparison, fans of JSC programming watch their favorite teams year in and year out, and develop an affinity for their favorite teams and its players that the Olympics simply cannot match.

30. Non-collegiate amateur sports, such as high school prep sports, cannot justify the decision to distantly retransmit a broadcast signal or carry a cable network. During my tenure at

---

<sup>20</sup> Olympic.org, *IOC Awards US Broadcast Rights for 2014, 2016, 2018, and 2020 Olympic Games* (June 7, 2011), <https://www.olympic.org/news/ioc-awards-us-broadcast-rights-for-2014-2016-2018-and-2020-olympic-games-to-nbcuniversal>.

<sup>21</sup> While they are compensable under the Section 119 license, I have reviewed recent Copyright Office data that show that the Section 119 license only generates approximately 5% of overall royalty payments in recent years.

DirecTV, I cannot recall ever launching a channel because of its non-collegiate amateur sports programming - that content would not have been compelling enough. I did not fear subscriber losses if I did not carry a channel that happened to offer non-collegiate amateur sports programming. I am aware of only a few low-value cable networks focusing specifically on non-collegiate amateur sports content, which is presumably the case because cable networks do not perceive a market for networks focusing on such programming. Families of athletes competing in prep sports may appreciate the availability of this programming through their pay TV service—but they are far more likely to be attending the game in person.

**C. MVPDs Value JSC Sports Programming Far More Than “Shoulder Programming”**

31. MGC further suggests that there is “no inherent difference” between live professional and collegiate team sports and a host of sports-related “shoulder programming,” such as sports highlight shows and rebroadcasts of old games.<sup>22</sup> What makes JSC programming so valuable is its live nature; passionate fans want to watch the game as it unfolds, and enjoy the tension that only exists while the outcome is still in dispute. Those features of JSC programming simply do not apply to a news program that packages together highlights from games that have already concluded, or to rebroadcasts of old games long after they were played.

32. This “shoulder programming”—so named because it helps to fill out a broadcast schedule when live professional and college team sports programming cannot be had—does not generate significant subscriber loyalty. Sports highlights and segments from sports programs are often available from multiple sources and, like other general entertainment programming, is often viewed passively. In addition, in my experience subscribers do not differentiate strongly between

---

<sup>22</sup> MGC Comments at 9-12.

these programs. If they do, it is not likely because of the sports aspects of the programs, but instead because they enjoy a specific anchor or other on-air talent.

33. This is borne out in MVPD carriage fees. MVPDs pay more than seven dollars per subscriber to carry ESPN—far more than they pay to carry any other cable network. They do not pay this substantial amount for sports news and highlights programs. They pay these rates for the live MLB, NBA, NFL and NCAA programming on these channels. By comparison, MVPDs pay \$0.33 per subscriber to carry ESPNNews, which largely carries highlight programs.<sup>23</sup> Similarly, MVPDs pay only \$0.27 per subscriber per month to carry ESPN Classic, which broadcasts shoulder programming and replays of sporting events, and carry the channel to roughly one-fifth of ESPN’s subscribers.<sup>24</sup> Many MVPDs have dropped ESPN Classic from their lineup entirely because of its limited appeal.<sup>25</sup>

34. Additionally, as I noted earlier, MVPDs generally require RSNs to commit to maintaining their distribution rights for live professional or NCAA basketball or football games. There are no similar protections for sports highlight programs on RSNs, because MVPDs are much less concerned about the potential loss of this programming.

35. It is also appropriate not to include old rebroadcasts of sports telecasts in the JSC category, as this limited amount of programming is more analogous to the general entertainment programming in the Program Suppliers category than live professional and collegiate team sports. A typical example of the programming that MGC proposes adding to the JSC category would be a rebroadcast of a “classic” game, like an old World Series telecast from the 1990s or 2000s. These

---

<sup>23</sup> Dick Decl. at ¶ 43.

<sup>24</sup> *Id.*

<sup>25</sup> Mike Farrell, *Disney, Altice USA Seal Carriage Deal*, Multichannel News (Oct. 5, 2017) (noting that Altice dropped ESPN Classic while adding the SEC and ACC Networks), *available at* <https://www.multichannel.com/news/disney-altice-usa-seal-carriage-deal-415734>.

broadcasts have a limited appeal. The broadcast quality lags modern standards; there is no remaining tension because the game was played years ago; and many current fans of the competing teams will not recognize the names on the jerseys.

**D. MGC’s Proposal Would Make it More Difficult to Assess the Value of the JSC Category**

36. In light of the foregoing, it would cause significant confusion to merge JSC programming with non-JSC sports-related content. At present, the results of cable system operator surveys provide a valuation of just the JSC category, a category that MVPDs understand well. However, if non-JSC sports related content were mixed in with JSC programming, the results of the survey would be less probative, as they would not distinguish between the distinct power of JSC programming and other sports-related content that does not have the same ability to retain and attract subscribers.

**V. The Current Category Definitions Are Conducive To Accurate Content Valuation**

37. In addition to the JSC category, I believe that the current definition for each of the other claimant categories “aggregate[s] programs . . . in a manner” that is consistent “with the cable system operators’ usual decision making process,” and therefore they are reasonably conducive to accurate program valuations.<sup>26</sup>

38. Each claimant category sensibly reflects the common role that the category of content plays in attracting and retaining subscribers. Each category shares common and distinctive features, and programming within the category—even if it varies in value—appeals to programmers for similar reasons. In making programming decisions, MVPDs look to maintain a variety of content that will keep customers on the platform, and consider the characteristics of

---

<sup>26</sup> Notice of Inquiry at 71853.

different types of programming on a channel, and whether that particular channel has content that is necessary to maintain customers. This process is reasonably replicated by the categories used in this proceeding, because they are all defined by a common appeal to particular subscribers.

39. **Devotional Claimants:** This category of programming appeals to a small subset of religious subscribers who appreciate access to religious programming via their pay TV service. It appeals to these subscribers precisely because it is religious. This subset of subscribers may prefer, for example, a religiously-themed children's program to a secular children's program, because they trust that the religious program will better reflect their values. In general, MVPDs do not pay for Devotional Claimants' programming.

40. **Commercial Television Claimants:** Most Commercial Television programming is local news and other programming of interest to a particular community. Subscribers who live in nearby geographic areas may find this programming appealing because they share a connection to the community in which it originates. Possibly, they grew up in that community, have relatives there, or work there, and are therefore interested in what is happening. They would not be equally satisfied if these local news programs were replaced with national news services.

41. **Program Suppliers:** This broad category of "general entertainment" programming, the bulk of which is undifferentiated sitcom reruns, older movies, and paid programming, is content that is passively viewed by subscribers, often during the middle of the day or in the wee hours of the morning. It is generally understood by MVPD programming executives as filling a similar role and helping to fill out the broadcast schedule. Programming executives understand that access to these reruns and old movies (as well as a substantial quantity of paid programming) will rarely, if ever, drive a subscriber's decision on whether to stay with or

subscribe to a particular MVPD. Non-JSC sports programming plays a similar role and thus properly belongs in the Program Suppliers category.

42. **Public Television Claimants:** As a DirecTV programming executive, I understood that certain subscribers appreciated content that was noncommercial in nature, *i.e.* the content in the Public Television category. This subset of subscribers appreciate that this programming is shown without ads, and sometimes provides a perspective that differs from those found on commercial alternatives.

43. **Canadian Claimants:** I understand that the Canadian claimants category includes programming aired on Canadian broadcast stations, except MLB and NHL games and other content owned by U.S. copyright owners. This makes imminent sense to me, given that Canadian programming is retransmitted exclusively near the Canadian border, where cable system operators reasonably expect that a subset of their subscribers will have a connection to Canada. Those subscribers may seek out programming specifically *because* it is Canadian, for example because they want to keep up with current events in Canada or speak French and enjoy French-language programming from Quebec.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 16, 2020.

  
Daniel Hartman



# **Appendix A**

# DANIEL M. HARTMAN

217 21st Street, Manhattan Beach, CA 90266  
310♦200♦6458 ♦ danhartman317@gmail.com

## EXPERIENCE

### President ♦ Hartman Media Consultants

Manhattan Beach, CA 2013-Present

Provide strategic advice to a variety of traditional and new media companies with respect to content acquisition and distribution.

### Senior Vice President, Programming Acquisitions ♦ DIRECTV, Inc.

El Segundo, CA 1998-2013

Responsible for program acquisition activities for DIRECTV with respect to all general entertainment, sports and premium networks as well as local broadcast stations. Negotiated carriage agreements for, and maintained day-to-day relationships with, all new and existing networks. Worked regularly with EVPs of Content and Marketing and CEO as lead strategist with respect to pricing and packaging of content as well as budgeting and forecasting of programming costs.

### Senior Counsel, Legal Affairs ♦ Fox Broadcasting Company/Fox Sports

Los Angeles, CA 1995-1998

Served as chief in-house counsel for Fox Sports, duties for which included negotiating and drafting documentation relating to sports rights acquisitions as well as all above-the-line personnel. Served as primary attorney for Fox Sports Marketing and Fox Sports Online. Also served as counsel for Fox Broadcasting Company, negotiating pilot/series agreements, production services agreements, content license agreements.

### Corporate Attorney ♦ O'Melveny & Myers

Los Angeles, CA 1989-1995

Drafted and negotiated documentation with respect to a variety of corporate and lending transactions.

## EDUCATION

### George Washington University Law Center

J.D., with honors, May 1989

Trustee Scholar

### The Pennsylvania State University

B.A., with Honors, May 1985 ♦ Communications, Business Minor

University Scholars Program; Presidential Medal of Achievement Recipient

## BOARDS

The Tennis Channel: 2007 - 2013

Los Angeles Sports Council/Southern California Committee for the Olympic Games: 2008-Present

Penn State College of Communications Advancement Council: 2014-Present

**Exhibit C - Declaration of Andrew R. Dick, Ph.D.**

**Before the  
COPYRIGHT ROYALTY JUDGES  
Washington, DC.**

<b><i>In re :</i></b>  <b>NOTICE OF INQUIRY REGARDING THE CATEGORIZATION OF CLAIMS FOR CABLE OR SATELLITE ROYALTY FUNDS AND THE TREATMENT OF INELIGIBLE CLAIMS</b>	<b>NO. 19-CRB-0014-RM</b>
--	---------------------------

**DECLARATION OF  
ANDREW R. DICK, Ph.D.**

March 16, 2020

## **TABLE OF CONTENTS**

I.	QUALIFICATIONS .....	1
II.	SUMMARY OF OPINIONS .....	3
III.	BACKGROUND .....	8
IV.	CATEGORIZATION OF CLAIMS .....	10
	A. Overview .....	10
	B. The Current Categories Comport With MVPDs' Ordinary Course Decision Making .....	14
	C. MGC's Proposed Changes to the Claimant Categories Would Negatively Impact the Accuracy of the Relative Valuation.....	23
	D. MGC's Proposed Changes to the Claimant Categories Would Increase Transaction Costs .....	27
	E. MGC's Proposed Changes to the Claimant Categories Would Make Contested Distribution Phase Proceedings More Difficult to Resolve .....	29
V.	DETERMINATION OF CLAIMS ELIGIBILITY .....	30
	A. Overview .....	30
	B. Resolving Claims Validity Does Not Impact the Relative Valuation of Claimant Categories .....	31
	C. Program Suppliers' Proposal Would Create Improper Incentives and Would Increase the Costs and Risks of Delay during the Allocation Phase.....	33
VI.	CONCLUSION.....	34

## **I. QUALIFICATIONS**

1. My name is Dr. Andrew Dick. I am an economist at Charles River Associates (“CRA”), an economics consulting firm, where I hold the position of Vice President in the Competition Practice. My business address is 1201 F Street, N.W., Washington, D.C. 20004. I received a Ph.D. and M.A. in Economics from the University of Chicago and a B.A. in Economics and Political Science from the University of Toronto. By training and experience, I am a specialist in competition economics, which involves the application of economic principles and methods to address questions about the structure and operation of markets.

2. My professional experience spans more than 25 years, the majority of which has involved analyzing competition issues. Prior to joining CRA in 2003, I was employed by the Antitrust Division of the U.S. Department of Justice (“DOJ”) for seven years where I held positions as Staff Economist and later Assistant Chief and then Acting Chief of the Competition Policy Section. While at the DOJ, I managed a large staff of Ph.D. economists working on competition assignments, including investigations involving the broadcast, cable, and satellite television industry and other media sectors. Previously, I was an Assistant Professor of Economics at the University of California, Los Angeles from 1989 to 1996 where I taught courses on microeconomics, competition, and antitrust and regulation policy. My research has focused on competition economics, including in regulated industries where prices are not set freely in the marketplace. I have published widely in peer-reviewed academic and practitioner journals on competition, market and monopoly power, the competitive effects and rationale of business policies and practices, and other issues relevant to competition economics. I have also made numerous invited presentations on competition topics to governmental and academic institutions.

3. As an economist at the DOJ and in private practice, I have evaluated competition issues in a broad variety of industries, including industries with direct relevance to the current proceeding. With respect to multi-channel video programming distributors (“MVPDs”), for example, I have been retained by clients to analyze competition as regards contracting between programming owners and cable systems operators and satellite

carriers, as well as competition issues involving cable, satellite, and online streaming distribution of live team sports programming. With respect to television and media competition more broadly, I have performed numerous competitive analyses relating to the supply of programming by television networks, first-run and off-network syndicators, and local television stations; competition in licensing cable/satellite channels to MVPDs; mergers and acquisitions involving local broadcast stations or cable/satellite channels; and competition between “traditional” and “new” media providers (e.g., competition between cable and satellite service providers such as Comcast and DirecTV and Online Video Programming Distributors (“OVPDs”) such as Hulu, Amazon, and Apple).

4. I also have significant experience in the field of sports economics. I have been retained on a variety of competition-related projects individually or collectively by the major professional sports leagues (National Hockey League, National Football League, Major League Baseball, and National Basketball Association), the National Collegiate Athletic Association, and other professional sports entities such as the Ultimate Fighting Championship and the Professional Rodeo Cowboys Association. Among the competition issues addressed during these engagements, I have analyzed the sale and promotion of college sports multi-media rights, differentiated product competition between sports and general media entertainment, and the competitive effects of different ownership arrangements as regards multi-media rights.

5. As both a research and consulting economist, I have applied my economics training and professional experience to assess how changes to an industry’s competitive environment or regulatory system can influence bargaining dynamics between prospective buyers and sellers and the eventual division of economic rents between those parties. I have also analyzed how different bargaining frameworks and regulatory systems affect the efficiency of market-related processes, as reflected in the transaction costs borne by negotiating parties and the risk of bargaining delays and “hold-ups.” As I will explain in my report, these economic principles have direct relevance to the issues raised in the current rulemaking inquiry.

6. I have testified as an expert on competition economics in federal court and before federal industry regulators. I have also made numerous expert submissions and presentations to federal, state, and foreign antitrust agencies in connection with competition investigations. I submitted written expert testimony in the Copyright Review Board's ("CRB") 2010-2013 Distribution of Satellite Royalty Funds proceeding relating to the allocation of royalties among claimant groups based on relative market value. Appendix 1 provides my curriculum vitae, which includes a list of recent litigation and regulatory proceedings where I have provided expert testimony.<sup>1</sup>

## **II. SUMMARY OF OPINIONS**

7. I understand the Copyright Royalty Judges ("Judges") are considering two proposals put forward by the Multigroup Claimants ("MGC") and Program Suppliers to alter the longstanding categories and processes used in proceedings related to Sections 111 and 119 of the Copyright Act. First, MGC proposes to create a new category that combines programming in the Joint Sports Claimant ("JSC") category with non-JSC "programming of a predominantly sports nature."<sup>2</sup> MGC's proposed category would include not only live professional and collegiate team sports (as has long defined the JSC category) but also an array of other sports-related content, including sports news programs, rebroadcasts of previously televised games, high school sports, and individual sports such as running and tennis. Second, Program Suppliers propose moving the determination of individual claims' eligibility forward from the Distribution Phase to the Allocation Phase of these proceedings.<sup>3</sup>

---

<sup>1</sup> I reserve the right to amend or supplement this declaration as I continue my analysis.

<sup>2</sup> Multigroup Claimants' Comments on Claimant Category Definitions and Proposed Modification, In the Matter of Distribution of 2014-2017 Cable Royalty Funds (Docket No. 16-CRB-0009 CD (2014-17)), In the Matter of Distribution of 2014-2017 Satellite Royalty Funds (Docket No. 16-CRB-0009 SD (2014-17)) (hereinafter "MGC Comments") at 15-16.

<sup>3</sup> Notice of Inquiry Regarding Categorization of Claims for Cable or Satellite Royalty Funds and Treatment of Ineligible Claims, Docket No. 19-CRB-0014-RM, 84 FR 71852-71854 (hereinafter "Notice of Inquiry") at 71854; Program Suppliers' Brief Regarding Proposed Claimant Group Definitions, In the Matter of Distribution of the 2014-17 Cable Funds, Docket No. 16-CRB-0009-CD (2014-17) (hereinafter "PS Brief") at 5-7.



8. Neither of these proposed changes would lead to more reliable measurement of the relative market value of programming categories, yet both would increase transaction costs and reduce incentives for settlement. MGC's proposal would result in a new sports category that combines programming that plays very different roles and which therefore MVPDs value very differently. The current JSC category consists of programming that is highly valued by MVPDs in order to attract and retain subscribers. The non-JSC, sports-related content that MGC seeks to combine with JSC content is not valued by MVPDs in the same way.

9. As the Judges previously explained, "[r]elative value is based on the *preferences* of [MVPDs] (derived from those of their subscribers)."<sup>4</sup> However, as a factual and economic matter, there are significant differences between programming that falls within the current JSC definition and the additional sports-related content that MGC seeks to combine into a new category. The distinct, high-value role played by live professional and collegiate team sports in attracting and retaining MVPD subscribers is well recognized in industry press and the economics literature and is also borne out by economic data. Combining programming that performs very different functions in MVPD decision making and that is valued very differently by MVPDs would not lead to a more accurate measure of relative value. To the contrary, it would lead to less accurate estimates of relative value.

10. Economic principles and industry evidence strongly support the view that the existing Allocation Phase programming categories, which have been used for nearly forty years in Sections 111 and 119 proceedings, are defined consistent with MVPD decision making and in a manner that accomplishes the goals of the Copyright Act. In any event, as a matter of economics, there is no reason to expect that rearranging the composition of claimant categories, as MGC proposes, would lead to different payments to rights holders. Reassigning programming that has previously been found to have little value to MVPDs to other claimant categories would not lead to such programming receiving a higher relative market value. Take, for example, paid programming, which is widely recognized as having

---

<sup>4</sup> Final Determination of Royalty Allocation, Docket No. CONSOLIDATED 14-CRB-0010-CD (2010-2013), 84 FR 3552-3611 (hereinafter "2010-13 Final Cable Determination") at 3556 (emphasis in the original).

no value to MVPDs. Moving paid programming currently included in the Program Suppliers category into the JSC category would not entitle paid programming to the premiums attributable to live professional and collegiate team sports. Paid programming has no value to MVPDs regardless of the claimant category to which it is assigned. The same holds true for the programming that MGC seeks to place in the JSC category. While some non-JSC sports-related programming may have more value than paid programming, none drives the decision to carry distant signals and thus none would be entitled to the premiums commanded by live professional and collegiate team sports. In a Distribution Phase proceeding, the owners of the non-JSC sports content would be entitled to no more than the programming is worth, which does not vary based on its assigned claimant category.

11. Adopting MGC's proposed change to the categories used in the Allocation Phase would also have adverse effects on the quality of the data available to the Judges for determining relative valuations of programming categories and on the likelihood of achieving settlements. The parties already have prepared studies to support relative valuations for the 2014-17 proceedings based on the current Allocation Phase categories. For example, I understand that JSC has conducted the constant-sum Bortz Survey for 2014-17. In order to ensure the collection of accurate and reliable information, it was important to perform such surveys close in time to the period being studied. If the claimant definitions were changed, the utility of the Bortz Survey likely would be diminished. The same would be true to the extent that the Program Suppliers plan to proffer a constant-sum survey by Horowitz or another expert.

12. A reconfiguration of claimant groups also would lead to an increase in the number of Distribution Phase disputes as well as increased challenges as to how to value disparate programming within a claimant group. Under the existing claimant group definitions, settlements between members of a given claimant group are frequent (with the notable exception of MGC). These settlements are facilitated by the fact that the programming within each claimant group shares common features, and thus members of a given claimant

group can negotiate resolutions.<sup>5</sup> That is not to say that the value of every program in the current categories is identical, but rather that the similarities are meaningful and thus allow for negotiated resolutions. However, if, as MGC proposes, claimant groups were redefined to include programming that plays very different functions in MVPD decision making and command very different relative values, then settlements would be much harder to achieve. Absent settlements, methodologies for estimating relative value among more heterogeneous programming within the same claimant group would need to be developed. All of this runs counter to the Copyright Act's public policy goal of reducing the transaction costs associated with compensating rights holders for retransmission of their programming on distant signals.<sup>6</sup>

13. Likewise, Program Suppliers' proposal to determine whether each of the tens of thousands of programs distantly retransmitted subject to Sections 111 and 119 each year is properly claimed and valid as part of the Allocation Phase process would not improve the accuracy of measuring relative market value.<sup>7</sup> Rather, the change to the Unclaimed Funds Rule proposed by Program Suppliers would significantly reduce efficiency and settlement incentives. The proposal rests on an implicit assumption that the number or volume of valid programming claims is what drives relative market value. As the Judges have explained previously, however, programming volume is *not* a measure of relative value.<sup>8</sup> The relative market value of each programming category is based on the value that MVPDs place on the programming in that category in attracting and retaining subscribers.<sup>9</sup> Accordingly, whether any particular claim might ultimately be found to be invalid would

---

<sup>5</sup> Distribution of 2004, 2005, 2006, 2007, 2008, and 2009 Cable Royalty Funds; Distribution of 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, and 2009 Satellite Royalty Funds, Docket Nos. 2012–6 CRB CD 2004–09 (Phase II) and 2012–7 CRB SD 1999–2009 (Phase II), 84 FR 16038-16048 (hereinafter “Feb. 2019 Phase II Determination”) at 16042 (“In a Phase II (or distribution phase) proceeding, the Judges must apportion royalties among relatively homogenous programs within a program category.”).

<sup>6</sup> U.S. Copyright Office, *Satellite Home Viewer Extension and Reauthorization Act Section 109 Report: A Report of the Register of Copyrights*, June 2008 at i-ii, 3.

<sup>7</sup> JSC Ex. E (Declaration of William E. Wecker and R. Garrison Harvey) (hereinafter “Wecker and Harvey Decl.”) at ¶9.

<sup>8</sup> 2010-13 Final Cable Determination at n. 148.

<sup>9</sup> JSC Ex. A (Declaration of Allan Singer) (hereinafter “Singer Decl.”) at ¶28.

not be expected to change the relative market value of the associated programming category. Furthermore, there is no reason to believe that the programming of the major rights holders is invalid. To the contrary, I understand that while there have been validity concerns related to claims filed by MGC in the past, members of the various claimant categories have not taken issue with the validity of the claims of their fellow group members.

14. As an economic matter, it is logical to consider the validity of claims during the Distribution Phase. Because the Allocation Phase is designed to assess relative value across sets of relatively homogenous programming, the Unclaimed Funds Ruling is economically appropriate and consistent with the evidence that is relied on in these proceedings. For example, surveys of MVPD executives ask respondents to value categories of programming based on general descriptions of each category, not on any one particular program. Therefore, to the extent that a small number of claims are found to be invalid, it would be improper to think of those programs as moving relative value from one category to another. It is the type of programming within each category that drives relative value, and not a small number of individual telecasts with disputed claims.

15. Importantly, moving claims validity issues to the Allocation Phase would require additional information to be collected across claimant groups so that each group could assess the validity of all claims within all other categories. Permitting inter-claimant group discovery during the Allocation Phase would create perverse economic incentives that would result in material inefficiencies, substantial delays, and impediments to settlement. The relative rarity of validity disputes in the Distribution Phase (with the notable exception of MGC claims) is economically consistent with each claimant being satisfied with the validity of other claims within its group. In contrast, allowing rights holders to argue the credibility of claims regardless of category during the Allocation Phase would encourage parties to engage in extensive inter-claimant group validity discovery, if for no other reason than to attempt to exert leverage over another claimant group. The Allocation Phase parties in the 2014-17 Cable Proceeding collectively represent thousands of claimants. Program Suppliers' proposal to assess claims validity during the Allocation Phase creates the potential for thousands of claimants fighting over the value of tens of thousands of

programs. This would create substantial costs of discovery and significantly delay the process of determining relative market valuations for claimant groups.

### III. BACKGROUND

16. Broadcast television signal owners are statutorily required to permit cable system operators and satellite carriers (together, “MVPDs”) to retransmit their signals into distantly situated geographic markets. As part of this compulsory licensing system, rights holders are entitled to receive royalty compensation according to a statutory rate set by Congress.<sup>10</sup> Because MVPDs pay for distant signals based on a statutory formula, there is not a free market-determined price available to assess the relative marketplace value of different program types. In 1980, therefore, the Copyright Royalty Tribunal (“CRT”) established a two-phase process to allocate and distribute royalties associated with the distant retransmission by cable system operators of broadcast signals to rights holders.<sup>11</sup> Through this two-phase proceeding, the Judges, as successors to the CRT, strive to ensure that compensation paid to rights holders for distant retransmission of broadcast signals containing their programs closely resembles the relative payments those entities would expect to earn in a hypothetical free (i.e., unregulated) market.<sup>12</sup> This approach has since been extended to the distribution of satellite royalties.<sup>13</sup>

---

<sup>10</sup> By statute, satellite system operators pay royalties based on a flat fee per subscriber and cable system operators pay royalties calculated as a percentage of their gross receipts (and in the case of larger cable system operators, the number and type of distant signals carried). Library of Congress, Copyright Office, Section 109 Report to Congress, Notice of Inquiry, 72 FR 19039-19055, 19041-42 (Apr. 10, 2007). The U.S. Copyright Office collects these royalties and then distributes them to copyright holders on a periodic basis as directed by the Judges.

<sup>11</sup> Notice of Inquiry at 71852.

<sup>12</sup> 2010-13 Final Cable Determination at 3555, n. 17 (“In this proceeding, the Judges distinguish between ‘relative values’ (to describe the allocation shares), and *absolute* ‘fair market values.’ Because the royalties at issue in this proceeding are regulated and not derived from any actual market transactions, they do not correspond with absolute dollar royalties that would be generated in a market and thus would not reflect absolute ‘fair market value.’”) (emphasis in original).

<sup>13</sup> See, e.g., Order Granting in Part Phase I Claimants’ Motion for Partial Distribution of 1999 through 2003 Satellite Royalty Funds, In the Matter of Distribution of 1999 through 2000 Satellite Royalty Funds, Docket No. 2008-5 CRB SD 1999-2000, In the Matter of Distribution of 2001, 2002 and 2003 Satellite Royalty Funds, Docket No. 2005-2 CRB SD 2001-2003 (December 8, 2008).

17. The Allocation Phase was established to determine the appropriate assignment of royalties to specific groups of rights holders that historically have been organized by defined claimant categories.<sup>14</sup> The Judges rely on representatives for these claimant categories to assemble relevant data and submit probative analyses that speak to the relative marketplace values of the programming within each category. Using information collected by the parties, the Judges allocate the total available pool of royalty funds across the different claimant categories in proportions intended to mirror the outcome that would be obtained in a free market.

18. The Distribution Phase was established to disburse allocated royalties to rights holders within each claimant group, after determining the validity of any contested rights claim. Many groups of rights holders are able to complete the Distribution Phase without a litigated proceeding before the Judges. When the Judges are faced with a litigated Distribution Phase proceeding, the Judges “must apportion royalties among relatively homogenous programs within a program category.”<sup>15</sup> Because the Distribution Phase concerns “relatively homogenous programs,” the Judges have explained that “[t]he ‘premium’ that some categories of programming can demand, irrespective of their levels of viewership, does not enter into the picture when all of the programs are in the same category.”<sup>16</sup>

19. This regulatory process was purposefully structured to achieve twin public policy objectives: (1) accurate measurement of the relative market value of programming as the

---

<sup>14</sup> The Allocation Phase was formerly known as “Phase I” and the Distribution Phase was formerly known as “Phase II.” 2010-13 Final Cable Determination at n. 5.

<sup>15</sup> Feb. 2019 Phase II Determination at 16042.

<sup>16</sup> *Ibid.* The Judges have previously rejected viewership as a measure of value during the Allocation Phase. 2010-13 Final Cable Determination at 3599-3600. Similarly, viewership is not a valid means of assessing the relative market value of unclaimed programs, because, as I explain in ¶74 below, one cannot assume that unclaimed programs have similar value to claimed programs. In written testimony I submitted in a related proceeding, I explained why the viewership analysis offered by Dr. Jeffrey Gray on behalf of Program Supplier is not an appropriate methodology for estimating relative market value. *See* Written Rebuttal Testimony of Andrew R. Dick, Ph.D., *In Re: Distribution of Satellite Royalty Funds* (No. 14-CRB-0011-SD (2010-13)), August 26, 2019 at §IV. I have continuing concerns about the use of Dr. Gray’s viewing analysis for the Distribution Phase, but that is not the subject of this proceeding.

basis to compensate rights holders, and (2) minimization of the transaction costs associated with distributing royalties to rights holders.<sup>17</sup> Below, I briefly explain how the longstanding use of established claimant category definitions during the Allocation Phase and the deferment of claims validation to the Distribution Phase help promote both of these public policy objectives.

#### **IV. CATEGORIZATION OF CLAIMS**

##### **A. Overview**

20. MGC has proposed a new claimant category for use in Allocation Phase proceedings consisting of all sports-related programming, including the live professional and college team sports broadcasts currently included in the JSC category, as well as re-broadcasts of previously played games, sports highlight shows, non-college amateur team sports such as high school football, the Olympics, and non-team sports.<sup>18</sup>

21. In the Notice of Inquiry, the Judges inquired “as to the merit of aggregating the Allocation Phase categories by program type rather than by claimant groups, and whether doing so may result in a distribution of royalties that more accurately reflects the relative value of different programming.”<sup>19</sup> From an economic perspective, because relative value is estimated based on the preferences of MVPDs, it is important that the Allocation Phase categories be consistent with how MVPDs value programming in the ordinary course of business. Because MVPDs earn the majority of their revenue from subscriber fees, they face a strong incentive to offer packages of desirable programming, including distant signals carrying live broadcasts of professional and college team sports. Consistent with this, the Judges previously explained that the relative value of programming is based on MVPDs’ preferences, which are in turn “derived from those of their subscribers.”<sup>20</sup>

---

<sup>17</sup> U.S. Copyright Office, *Satellite Home Viewer Extension and Reauthorization Act Section 109 Report: A Report of the Register of Copyrights*, June 2008 at i-ii, 3.

<sup>18</sup> Order Staying Proceeding Pending Rulemaking, In re: Distribution of Cable Royalty Funds, Docket No. 16-CRB-0009 CD (2014-17) at 3.

<sup>19</sup> Notice of Inquiry at 71853.

<sup>20</sup> 2010-13 Final Cable Determination at 3556.

22. The long-standing claimant groups used in Allocation Phase proceedings for decades reflect how MVPDs value programming in the normal course of business. This is not merely a question of the type of programming offered. Making the changes that MGC proposes would move Allocation Phase proceedings away from longstanding categories that are consistent with MVPDs' normal decision making, leading to less accurate estimates of relative market value.

23. MGC's proposed changes also would impact the reliability of empirical approaches that the Judges have historically relied on in assessing relative value. In previous proceedings, the Judges have relied on regression analyses and survey evidence during the Allocation Phase.<sup>21</sup> Combining more heterogeneous programming that is not similarly valued by MVPDs into a single category, as MGC proposes, risks introducing estimation bias into regression analyses. As I explain later, this bias would lead to less accurate measurement of relative value.

24. Similarly, MGC's proposed changes would also potentially harm the reliability of the constant-sum surveys relied upon in multiple past proceedings, including the 2010-13 Cable Proceeding. To yield reliable data, surveys must be prepared relatively close in time to the years being studied.<sup>22</sup> Accordingly, I understand that the JSC has already performed the Bortz Survey for 2014-17 based on the historically relied-upon Allocation Phase categories. Changing the claimant categories now for the upcoming 2014-17 Proceeding would make this survey, and any other constant-sum surveys, less reliable and thus less

---

<sup>21</sup> 2010-13 Final Cable Determination at 3610 (The Judges conclude that the Horowitz Survey responses and the regression analysis prepared by Professor Crawford "are the best available measures of relative value of the program categories."). Distribution of the 2004 and 2005 Cable Royalty Funds, Docket No. 2007-3 CRB CD 2004-2005, 75 FR 57063-57079 (hereinafter "2004-05 Final Cable Determination") at 57065 ("[T]he Judges find that the values of the program categories at issue among these contending claimants are most reasonably delineated by a range bounded by certain results indicated primarily by the Bortz constant sum survey, to a lesser extent by the Waldfogel regression analysis and, to a slight extent, by the Gruen constant sum survey.").

<sup>22</sup> JSC Ex. D (Declaration of James Trautman) (hereinafter "Trautman Decl.") at ¶¶3, 8, and n. 2.



useful. This has important consequences for the ability of the Judges to cite multiple sources of evidence in “triangulating” the relative value of programming.<sup>23</sup>

25. The increased heterogeneity introduced by MGC’s proposal would increase transaction costs and reduce efficiency by making Distribution Phase resolutions more difficult. Because the current claimant categories are organized around programming that plays similar roles in MVPD decision making, the members of claimant groups (with the notable exception of those groups in which MGC claims royalties) often are able to negotiate distribution agreements. However, if the groups are redefined to include highly dissimilar programming, reaching agreement would be far more difficult. Moreover, if a Distribution Phase proceeding is necessary, the increased heterogeneity introduced by MGC’s proposed changes to the claimant categories would require a far more complex distribution process than is currently used for more homogenous groups. Indeed, a process similar to the current Allocation Phase would be required to make a distribution. This, in turn, would introduce more expense and burden into the distribution process, a result that is at odds with the goals of the Copyright Act.

26. Contrary to MGC’s assertions, the compensation that a claimant receives would not change simply because of changes to the Allocation Phase groups. Regardless of category, programming receives its relative worth as determined by a Distribution Phase proceeding. Low value programming, for example, would not suddenly become high value programming simply by being placed in the same category as JSC programming. For example, paid programming, which I understand is not seen as valuable by MVPDs, would not become valuable if it were grouped with other types of programming.<sup>24</sup> In an

---

<sup>23</sup> For example, in the 2010-13 Cable Allocation, the Judges wrote that they were “struck by the relative consistency of the results across the accepted methodologies” they considered, including results of surveys of CSO executives. 2010-13 Final Cable Determination at 3610. In the 2004-2005 proceeding, the Judges relied on survey results in their final determination, but viewed the regression analysis offered by Dr. Waldfogel as providing “additional useful, independent information about how cable operators may view the value of adding distant signals based on the programming mix on such signals.” 2004-05 Final Cable Determination at 57068.

<sup>24</sup> Written Rebuttal Testimony of Daniel M. Hartman, *In Re: Distribution of Satellite Royalty Funds* (No. 14-CRB-0011-SD (2010-13)), August 26, 2019 (hereinafter “Hartman 2010-13 Satellite WRT”) at ¶¶12, 26.

imaginary world where participants to the proceedings had complete and costless access to information and there were no other transaction costs, the specific claimant groups used to classify programming might not affect royalty distributions. In that imaginary setting, information about the relative value of each individual program would be freely accessible. But in reality, information is costly to acquire and negotiations are costly to undertake. The two-phase process established by the CRT is designed to reduce cost and improve efficiency by assessing the relative value of different programming categories in the first stage and then distributing allocated royalties among the various owners of similarly-valued rights in the second stage. MGC's proposal would introduce additional heterogeneity among rights owners in the Distribution Phase, thus reducing the efficiencies of the two-stage process.

27. Finally, while MGC only proposes changes to how sports-related programming is categorized, it would not be logically consistent to limit this change to only one type of programming. Defining claimant categories based on the general characterization of programming would result in changes to other Allocation Phase categories. For example, applying MGC's approach across all programming might lead to a new general entertainment category (drawing from certain programming that is currently categorized with the Program Suppliers, Public Television Claimants, or Canadians Claimants); a separate category for all paid programming (which is currently split between Program Suppliers and the Settling Devotional Claimants); and a separate news programming category (which would include programming currently grouped in the Commercial Television and Public Television categories). Like MGC's proposed changes to the categorization of sports programming, these new categories would not be better aligned with how MVPDs evaluate programming in the normal course of business.<sup>25</sup>

---

<sup>25</sup> Singer Decl. at ¶¶40-45; JSC Ex. B (Declaration of Daniel Hartman) (hereinafter "Hartman Decl.") at ¶¶37-43.

**B. The Current Categories Comport With MVPDs' Ordinary Course Decision Making**

28. In the Notice of Inquiry, the Judges asked whether the current claimant categories are consistent with MVPDs' ordinary course decision-making processes.<sup>26</sup> Based on the testimony of industry executives, publicly available information, economic principles, and studies performed in prior cable and satellite allocation proceedings, I have concluded that the current claimant categories are consistent with how MVPDs evaluate programming. This is particularly true for the highly valued programming that comprises the JSC category.

29. I have reviewed the testimony of Allan Singer, a former senior programming executive at Charter and Comcast, and Daniel Hartman, a former senior programming executive at DirecTV. Both Mr. Singer and Mr. Hartman explain that live team professional and collegiate sports play a distinctive role in MVPD decision making due to the ability of this programming to retain and attract subscribers.<sup>27</sup> This ability stems from, among other factors, the combination of the passionate fan base, the live nature of the programming, and the fact that similar programming is not ordinarily available from other sources without substantial costs. As a result, MVPDs run a substantial risk of losing current or prospective subscribers if they do not carry JSC programming.

30. The ability of JSC programming to attract and retain subscribers drives MVPDs' decisions to carry distant signals. Mr. Singer and Mr. Hartman likewise explain that the non-JSC sports-related content that MGC seeks to include within the JSC definition does not have the ability to attract and retain subscribers and does not drive programming decisions. For example, MVPDs do not make decisions to carry distant signals based on the presence of a sports news show, the rebroadcast of an old game, high school games, or individual sports.<sup>28</sup>

---

<sup>26</sup> Notice of Inquiry at 71853.

<sup>27</sup> Singer Decl. at ¶¶12-13, 17-27; Hartman Decl. at ¶¶8-10, 13-21.

<sup>28</sup> Singer Decl. at ¶¶28-39; Hartman Decl. at ¶¶22-35.

31. Mr. Singer and Mr. Hartman both note that MVPDs treat JSC programming differently from the non-JSC sports-related programming in their carriage agreements. For example, they point out that regional sports network (“RSN”) carriage agreements contain provisions that reduce monthly fees in the event that an RSN loses its rights to carry the telecasts of a college or professional team or a substantial number of games.<sup>29</sup> There are no similar provisions for non-JSC sports-related content carried on RSNs such as sports news programs, rebroadcasts, or individual sports.<sup>30</sup> To an economist, the use of such provisions for JSC content but not for other sports-related programming is strong evidence that MVPDs and RSNs view JSC content differently from other sports-related programming in the ordinary course of business. Specifically, the contractual agreement to link affiliate fees to the presence of professional and collegiate team sports games indicates RSNs and MVPDs view such programming as an important driver of the market value of these networks. Conversely, the absence of similar provisions for non-JSC sports-related content implies that such programming is not an important determinant of how the marketplace values RSNs’ service offering.

32. Mr. Singer and Mr. Hartman’s testimony also is consistent with the testimony of David Shull, the former senior programming executive for DISH. In the 2010-13 Satellite proceeding, Mr. Shull described the power of live team sports programming to retain and attract subscribers.<sup>31</sup>

33. The economics literature provides additional confirmation of this point. The live professional and college team sports broadcasts that comprise the JSC category share key attributes such as large and passionate fan bases, longstanding and continuing rivalries, wide distribution, and regularly scheduled seasons leading up to annual post-season championships.<sup>32</sup>

---

<sup>29</sup> Singer Decl. at ¶13; Hartman Decl. at ¶21.

<sup>30</sup> *Ibid.*

<sup>31</sup> Written Direct Testimony of David Shull, *In Re: Distribution of Satellite Royalty Funds* (No. 14-CRB-0011-SD (2010-13)), March 22, 2019 (corrected June 7, 2019) at ¶¶20-25.

<sup>32</sup> Roger D. Blair, *Sports Economics* (Cambridge University Press, 2012) at 46-47.

34. Prior studies relied on by the Judges in prior cable proceedings confirm the distinct role that JSC programming plays in MVPD decision making. In written testimony submitted in a related proceeding, I explained that the programming preferences of system operators can be revealed using the widely-accepted economic methods of market participant surveys and regression analysis.<sup>33</sup> To measure the relative marketplace values of different programming categories, the Judges have applied the economic principle of “revealed preference.”<sup>34</sup> Surveys can reveal MVPDs’ preferences across programming categories by asking executives to allocate a fixed budget among different programming categories on the various distant broadcast signals they carried during a specific period. MVPDs’ preferences also can be revealed through economic regression analyses that decompose the value of distantly retransmitted signals into their constituent programming types. Consistent with the economic principle of revealed preference, the Judges have relied on regression analyses and survey evidence to corroborate the comparatively high value that system operators place on JSC programming.<sup>35</sup>

35. Survey evidence collected for prior proceedings also provides insight as to how MVPDs value the non-JSC sports-related programming that MGC seeks to include in its new proposed Allocation Phase category. In the 2010-13 Cable Proceeding, Program Suppliers attempted to use a survey to value non-JSC sports-related programming, which Program Suppliers referred to as “other sports.” While the Judges concluded that the survey’s treatment of “other sports” was flawed and significantly overstated the value of

---

<sup>33</sup> Written Direct Testimony of Andrew R. Dick, Ph.D., *In Re: Distribution of Satellite Royalty Funds* (No. 14-CRB-0011-SD (2010-13)), March 22, 2019 (corrected June 7, 2019) at ¶¶17-20.

<sup>34</sup> 2010-13 Final Cable Determination at 3556 (citing to Andrew Schotter, *Microeconomics: A Modern Approach* (Cengage Learning, 2009) for the proposition that “revealed ‘preferences’ allow for an analysis of how buyers ‘behave in markets,’ and those preferences are building blocks for ‘individual and market demand’”).

<sup>35</sup> 2010-13 Final Cable Determination at 3610 (The Judges conclude that the Horowitz Survey responses and the regression analysis prepared by Professor Crawford “are the best available measure of relative value of the program categories.”). 2004-05 Final Cable Determination at 57065 (“[T]he Judges find that the values of the program categories at issue among these contending claimants are most reasonably delineated by a range bounded by certain results indicated primarily by the Bortz constant sum survey, to a lesser extent by the Waldfoegel regression analysis and, to a slight extent, by the Gruen constant sum survey.”).

this programming,<sup>36</sup> the survey still implied a valuation of non-JSC sports-related programming that was in some years *less than one-quarter* of the value that MVPDs placed on JSC programming.<sup>37</sup> From this survey evidence, it is clear that MGC's proposal to place JSC and non-JSC sports-related programming in the same claimant category would combine programming of a heterogeneous nature and highly dissimilar value.

36. A study of affiliate fees and ratings for basic cable network ratings performed during the 2010-13 Satellite Proceeding also demonstrates the extent to which MVPDs place a premium on networks that carry JSC programming. Among the most-carried cable networks during that time period, MVPDs paid much higher affiliate fees relative to viewership for networks that carried JSC programming compared to networks that did not carry JSC programming. In particular, MVPDs paid affiliate fees that were 6.5 to 8.3 times greater on a per-rating point basis for cable networks that carried JSC programming relative to general entertainment networks.<sup>38</sup>

37. During the 2014-17 time period, RSNs received monthly affiliate fees from MVPDs that averaged \$2.17 per subscriber month and went as high as \$6.11 per subscriber (YES Network in 2017).<sup>39</sup> On the other hand, basic cable networks that SNL Kagan categories as "general/variety" and which did not carry JSC programming earned monthly per-subscriber affiliate fees ranging between \$0.03 (POP in 2014) to \$1.26 (USA in 2017), with an average of only \$0.24.<sup>40</sup> These relative affiliate fees are consistent with MVPDs

---

<sup>36</sup> The Judges in the 2010-13 Cable Proceeding concluded that the inclusion of the "Other Sports" category in the Horowitz Survey was flawed and "created a value where none, or next to none, existed." Because of these flaws, the Judges reapportioned the "Other Sports" share from the Horowitz Survey across all six claimant groups. 2010-13 Final Cable Determination at 3591.

<sup>37</sup> 2010-13 Final Cable Determination at 3591 and Table 12.

<sup>38</sup> Written Rebuttal Testimony of James M. Trautman, *In Re: Distribution of Satellite Royalty Funds* (No. 14-CRB-0011-SD (2010-13)), August 26, 2019 (hereinafter "Trautman 2010-13 Satellite WRT") at 4-7.

<sup>39</sup> Data in this paragraph are based on SNL Kagan estimates.

<sup>40</sup> SNL Kagan classified TNT, TBS, and TruTV as "general/variety" basic cable networks, but these networks are excluded from this analysis since they carry JSC content, including the NCAA March Madness basketball tournament.

placing substantially higher value on RSNs that feature JSC programming than general entertainment networks like USA, FX, and Bravo.

38. Other analyses demonstrate how the value of JSC programming is recognized by other industry participants. For example, a study of TNT and TBS prepared during the 2010-13 Cable Proceeding found that more than 40 percent of these networks' programming expenditures were for JSC content, even though JSC content comprised only two to three percent of the networks' total programming hours.<sup>41</sup> This study found that the top 25 cable networks spent 22.68 percent of their total programming expenditures on JSC programming even though JSC programming corresponded to just 2.96 percent of total household viewing hours.<sup>42</sup>

39. The existence of a significant valuation premium associated with JSC programming has not changed since prior proceedings. MVPDs continue to pay large and increasing amounts to carry live professional and college sports programming that is desirable to subscribers.<sup>43</sup> As a recent industry report explained:

“Fans will pay for video packages and add-ons to ensure they never miss a minute of their favorite team in action, and the major media conglomerates know it. TV networks shell out big bucks to the pro leagues for the rights to broadcast games. Networks pass the cost of right on to multichannel operators through license fees and retransmission, then to the consumer in the form of higher bundle prices and surcharges.”<sup>44</sup>

By comparison, one former MVPD executive described non-sports programming as becoming “increasingly fungible,”<sup>45</sup> while another explained that “over time general

---

<sup>41</sup> Written Direct Testimony of Dr. Mark A. Israel, *In Re: Distribution of Cable Royalty Funds* (No. 14-CRB-0010-CD (2010-13)), December 22, 2016 (hereinafter “Israel 2010-13 Cable WDT”) at ¶¶49-51.

<sup>42</sup> Israel 2010-13 Cable WDT at ¶47.

<sup>43</sup> Adam Gajo, John Fletcher, Scott Robson and Brian Bacon, *The Economics of Networks; The 2019 Sports Report*, SNL Kagan, April 4, 2019.

<sup>44</sup> *Ibid.*

<sup>45</sup> Written Direct Testimony of Daniel M Hartman, *In Re: Distribution of Cable Royalty Funds* (No. 14-CRB-0011-CD (2010-13)), December 22, 2016 at ¶27. *See also ibid* at ¶32.

entertainment programming has become more and more homogeneous, undifferentiated and accessible to viewing whenever and wherever one wants it and on an abundance of platforms.”<sup>46</sup>

40. MGC’s proposed sports-related programming catchall category, which would lump together recorded sporting events, sports highlight shows, and high school sports in the same category as highly valuable live telecasts of NFL, NBA, MLB, NHL, and NCAA football and basketball games, would diverge significantly from what MVPDs have long seen as highly valuable programming that drives retransmission decisions. Studies prepared in prior proceedings demonstrate that the current claimant categories are consistent with MVPDs’ ordinary course decision making and valuation, particularly related to JSC programming. In the remainder of this section, I explain how MGC’s proposed changes would depart from MVPDs’ ordinary decision making.

**1. JSC Programming is Valued Fundamentally Differently  
than Recorded Programming in MVPDs’ Ordinary  
Course Decision Making**

41. MGC argues that “no inherent difference exists” between a live team sports event and a rebroadcast of a previously broadcast sporting event.<sup>47</sup> However, this argument is fundamentally at odds with system operators’ ordinary business decisions. As I have previously noted, economists regard market participants’ ordinary-course business decisions as a reliable information source to reveal the preferences of those economic actors.

42. MGC concedes that live sports broadcasts are “most certainly more valuable” than recorded sports programming.<sup>48</sup> The live nature of these broadcasts fundamentally affects the way they are valued by broadcasters and, of particular relevance to these proceedings, system operators. As a recent industry report explained, “[t]he DVR-proof nature of

---

<sup>46</sup> Written Direct Testimony of Allan Singer, *In Re: Distribution of Cable Royalty Funds* (No. 14-CRB-0011-CD (2010-13)), December 22, 2016 at ¶17.

<sup>47</sup> MGC Comments at 9.

<sup>48</sup> *Ibid.*



televised sports incentivizes national sports networks like ESPN to pay leagues such as the NBA and NFL an exorbitant amount of money to broadcast games and prevent them from turning to competitors like FOX Sports 1.”<sup>49</sup>

43. Consistent with the desirability of live sports programming, system operators pay far more to carry cable networks with live sports programming. For example, SNL Kagan estimates that system operators paid an average of \$7.69 per subscriber per month to carry ESPN in 2019. By comparison, ESPNNews, which largely carries highlight programs, earned affiliate fees of only \$0.33 per subscriber per month in 2019. Similarly, system operators paid only \$0.27 per subscriber per month to carry ESPN Classic, which, unlike the main ESPN channel, focuses on shoulder programming and replays of sporting events instead of live events. According to SNL Kagan’s estimates, the monthly affiliate fee earned by ESPN Classic was also less than the affiliate fee earned by any regional sports network in 2019. ESPN Classic also reached far fewer subscribers than the main ESPN network. SNL Kagan estimates that ESPN Classic reached 18.3 million subscribers in 2019, or roughly one-fifth the 84.1 million subscribers to ESPN. In 2014, in light of declining carriage by MVPDs, ESPN Classic began to transition to an on-demand service instead of a traditional linear cable network.<sup>50</sup>

44. Unlike rebroadcasts of sporting events, system operators rely on live sporting events to attract and retain subscribers.<sup>51</sup> Contrary to MGC’s assertion, there are significant inherent differences between live and recorded telecasts of sporting events. Sports highlight shows, which combine recorded portions of multiple sporting events, similarly lack the attractiveness of live sports programming.

---

<sup>49</sup> Adam Gajo, John Fletcher, Scott Robson and Brian Bacon, “The 2019 Sports Report,” *SNL Kagan Economics of Networks*, April 4, 2019.

<sup>50</sup> Sarah Barry James, “ESPN: When classic gets old,” *S&P Global Market Intelligence*, July 8, 2014 (noting that “in general, networks that rely on ‘classic’ or repeat programming, whether it is decades-old sport matches or TV shows, are having a tough time surviving in an on-demand world.”); Scott Robson “The Economics of Networks: G4 closes operations; ESPN Classic slowly transitions to VOD,” *S&P Global Market Intelligence*, December 30, 2014.

<sup>51</sup> Singer Decl. at ¶29; Hartman Decl. at ¶¶31-35.

**2. JSC Programming Is Valued Fundamentally  
Differently than Telecasts of Non-College Amateur  
Sports in MVPDs' Decision Making**

45. MGC asserts that “[n]o inherent difference exists that would suggest that non-college amateur sports would be considered differently by a system operator than ‘professional and college’ sports broadcast.”<sup>52</sup> MGC thus contends that telecasts of high school sporting events, for example, would be considered no differently than a live telecast of NFL football game by system operators. However, as compared to JSC programming, broadcasts of non-college amateur team sports such as high school games typically are valued much less by MVPDs because of their inferior ability to attract and retain subscribers.<sup>53</sup>

46. MGC points to Olympic broadcasts as highly viewed non-college amateur sports programming.<sup>54</sup> Rights to Olympic telecasts have long been held by the NBC network, and network-originated programming on NBC affiliate stations is not compensable in the cable proceedings.<sup>55</sup> Moreover, unlike live professional and college team sports, which have annual seasons, the Olympics are held only every other year. According to industry experts, MVPD programming executives view the Olympics as more akin to a “special” than to JSC programming.<sup>56</sup>

**3. JSC Programming Is Valued Fundamentally  
Differently than Telecasts of Individual Sports in  
MVPDs' Decision Making**

47. MGC argues that there are no inherent differences between team sports and individual player sports, but this ignores the salient characteristics of team sports. Empirical analyses of sports leagues point to the distinct and important differences between team and individual sports. For example, one study found that NHL teams that relocated

---

<sup>52</sup> MGC Comments at 10.

<sup>53</sup> Singer Decl. at ¶35; Hartman Decl. at ¶30.

<sup>54</sup> MGC Comments at 10.

<sup>55</sup> Singer Decl. at ¶36; Hartman Decl. at ¶¶27-29; Wecker and Harvey Decl. at ¶11.

<sup>56</sup> Singer Decl. at ¶36; Hartman Decl. at ¶29.

to a new city reduced away-game attendance by three to four percent relative to teams that did not move.<sup>57</sup> As the authors explained, changing the city with which a team is associated, but not the individual players who comprise the team, led to a reduction in interest in the team by fans in other cities. This is consistent with sports team deriving a significant portion of fan interest separate and apart from individual players on the team. In this way, teams and leagues foster long-term interest from fans, who in turn look for MVPDs who carry team sports.

48. Individual player sports, on the other hand, can see fan interest swing dramatically based on the presence of a small number of superstar players. For example, interest in golf increased when Tiger Woods returned to the PGA tour for the 2017-18 season for the first time in years, but then decreased in the following season when he played in fewer Tour events.<sup>58</sup> NASCAR has seen similar decreases in viewership and live attendance as popular drivers retired from the sport.<sup>59</sup> These salient differences between team sports and individual player sports drive fans, broadcasters, and system operators to value them differently.

49. Consistent with this, MVPDs typically pay less to carry cable networks that are dedicated to individual sports than they do to carry networks featuring JSC programming. According to SNL Kagan, the Tennis Channel earned \$0.15 per subscriber per month in 2019. This is significantly less than the average \$2.81 affiliate fee earned by RSNs or other

---

<sup>57</sup> Dennis W. Carlton, Alan S. Frankel, and Elisabeth M. Landes, “The control of externalities in sports leagues: an analysis of restrictions in the National Hockey League,” *Journal of Political Economy* 112(S1) (February 2004): S268-S288.

<sup>58</sup> Austin Karp, “PGA Tour Season Viewership Lower With Less Tiger Woods On TV,” *Sports Business Daily*, September 6, 2019. Viewership of PGA Tour events also decreased when Tiger Woods was involved in an off-the-course scandal in 2010. John Ourand, “Women staying tuned to NFL,” *Sports Business Journal*, November 17, 2014.

<sup>59</sup> Adam Stern, “NASCAR’s numbers,” *Sports Business Journal*, July 9, 2018. Speedway Motorsports, Inc., Annual Report 2018 at 36 (“From time-to-time, extremely popular and long-standing successful race car drivers (‘megastars’) such as Dale Earnhardt Jr, Jeff Gordon, Tony Stewart, Carl Edwards, Matt Kenseth and Danica Patrick announce their retirement or reduced motorsports racing due to age, health or other considerations. Similar to most sports, injuries or other concerns for participant well-being can lead to early ‘retirement’ or reduced sport involvement. Race car driver popularity and performance abilities can affect on-track competition, the closeness of championship points racing, attendance, corporate interest, media attention and the appeal and success of racing in general.”).

basic cable networks that carry JSC programming, including ESPN (\$7.69 per subscriber month).

**C. MGC's Proposed Changes to the Claimant Categories Would Negatively Impact the Accuracy of the Relative Valuation**

50. Not only are the current categories consistent with MVPD decision making, but the changes proposed by MGC would weaken the accuracy of relative market valuation performed by the Judges for multiple reasons.

51. Economic principles indicate that efforts to measure programs' relative value will be more accurate when that analysis is performed using categories that group together programming that market participants regard as being relatively similar in economic value. Such categories improve the reliability and accuracy of the survey and regression analyses upon which the Judges have historically relied.

52. In prior proceedings, the Judges have placed substantial weight on surveys of system operator executives when assessing relative value.<sup>60</sup> These executives oversee retransmission decisions of signals that consist of innumerable different programs. Therefore, for the surveys to collect accurate and useful information related to relative value, respondents must be able to base categories of programming that are widely used by MVPDs in their decision making without specific knowledge of each individual program.<sup>61</sup> The claimant categories consist of programming that is easily identified and has relatively similar value.

53. MGC's proposed changes to the treatment of sports-related programming would further impact the accuracy and reliability of survey data through an additional mechanism. For survey-based analyses to be reliable, the surveys must be fielded relatively close in time to when system operators made retransmission decisions.<sup>62</sup> I understand that surveys

---

<sup>60</sup> See, e.g., 2004-05 Final Cable Determination at 57065.

<sup>61</sup> Trautman Decl. at ¶¶4-5, 10, 14.

<sup>62</sup> Trautman Decl. at ¶¶3, 8 and n. 2.

for the upcoming 2014-17 Cable Proceedings have already been fielded using the historically relied upon claimant categories.

54. As with surveys, the reliability of regression-based analyses also is directly affected by the degree of homogeneity within claimant categories. In the 2004-05 and 2010-13 Cable Allocations, the Judges considered regressions analyses in their assessment of relative value during the Allocation Phase. In the 2010-13 Cable Allocation, the Judges placed “primary reliance” on a regression analysis offered by Professor Gregory Crawford.<sup>63</sup> During the Allocation Phase of the 2004-05 Cable Proceeding, the Judges relied on a similar regression analysis by Professor Joel Waldfogel for “additional useful, independent information about how cable operators may view the value of adding distant signals based on the programming mix on such signals.”<sup>64</sup>

55. The regression analyses that have been considered in Allocation Phase proceedings estimate the relative value of programming belonging in each claimant category through a statistical model that relates the royalties paid by a cable system operator to the minutes of distant signal programming retransmitted by the system in each claimant category.<sup>65</sup> Because these models relate the amount that system operators pay to carry a group of distant signals to the composition of those signals across the claimant groups, they are a useful analytical tool for implementing the hypothetical market that the Judges have described.

56. However, a regression analysis can be made less reliable if there is increased heterogeneity within a category.<sup>66</sup> The goal of a regression analysis is to identify how one factor is correlated with an outcome, after controlling for other factors that may also be correlated with the outcome. In order for a regression analysis to estimate these relationships accurately, the explanatory factors cannot have known measurement error.

---

<sup>63</sup> 2010-13 Final Cable Determination at 3610.

<sup>64</sup> 2004-05 Final Cable Determination at 57068.

<sup>65</sup> 2010-13 Final Cable Determination at 3556-3558.

<sup>66</sup> Jeffrey M. Wooldridge, *Introductory Econometrics: A Modern Approach* (South-Western, Cengage Learning, 5th ed., 2013) at 330-331; *Econometrics: Legal, Practical, and Technical Issues* (J. Harkrider, ed.), American Bar Association, Antitrust Section, 2005 at 68-69.

One way that measurement error can be introduced is through aggregating unrelated measures into a single potential explanatory factor. Suppose, for example, that an analyst wanted to estimate the relationship between weekly household spending on groceries and the number of people residing in a household. The analyst could estimate a regression that relies simply on the number of people in the household as the explanatory factor. However, if children consume less food than adults, this regression analysis would lead to unreliable results. The regression model sees two households, each with four residents, and would be incapable of fully explaining their differences in grocery spending. A more reliable regression model would estimate weekly grocery spending as a function of the number of children in a household and the number of adults in a household as separate measures. With separate measures, the regression model could differentiate between a household with two adults and two children versus a household with four adults. Combining children and adults into a single measure introduces heterogeneity bias.

57. Just as combining adults and children into a single category introduces increased heterogeneity bias in a simple model of grocery spending, combining very different types of programming into common categories would introduce increased heterogeneity bias in the fee-based regressions on which the Judges have relied. For example, if a claimant category aggregates programming that drives MVPD decision making (such as telecasts of live team sports) with programming that does not (such as telecasts of local high school sports), the regression analysis will generate a less accurate estimate of the relative value of programming across categories. This is not to say that the current categories are entirely homogeneous (it is not possible to have entirely homogenous categories), but MGC's proposal would significantly increase within-category heterogeneity and thus would render the regression results less accurate.

58. Impacting the probative value of the two main methodologies used by the Judges in recent proceedings would substantially impair the relative valuation process. Not only would the results of each methodology be impacted, the Judges would lose the benefit of being able to "triangulate" across multiple independent types and sources of information as a way to increase the accuracy of measuring the relative marketplace value of different program categories. Economists recognize the benefit to be had from comparing various

types and sources of empirical and economic evidence in disputes to other information to ensure accurate results.<sup>67</sup> In prior proceedings, the Judges have adopted this triangulation approach by comparing the results of survey-based analyses to the relative values estimated through regression models.<sup>68</sup>

59. In recent allocation proceedings, the Judges also have considered comparisons of empirical results over time. For example, in the 2010-13 Cable Allocation, the Judges discussed a comparison of the results of the 2004-05 cable system operator surveys to the results of the 2010-13 surveys.<sup>69</sup> Similarly, in the 2004-05 Cable Allocation, the Judges considered analysis from the Settling Devotional Claimants that compared survey results from the 2004-05 Cable Proceeding to results from the 1990-92 Cable Proceeding.<sup>70</sup> A change in the long-established and relied upon claimant categories would complicate the ability of rights holders to present, and the Judges to consider, such comparisons over time when determining appropriate royalty allocations.

60. Finally, MGC's proposal is logically inconsistent in its treatment of claimant categories. As I explained above, in support of its proposal for changing the current

---

<sup>67</sup> Daniel L. Rubinfeld, "Quantitative Methods in Antitrust," chapter 30 in *Issues in Competition Law and Policy* (W.D. Collins, ed.), American Bar Association, Antitrust Section, 2008, 723-742 at 742 ("Because empirical analyses often appear complex to the lay person, there may be a tendency on the part of the courts or others to separate the evaluation of the evidence resulting from these methodologies from other factual evidence. Such a separation is inadvisable. The empirical analysis of data should be combined with an analysis of nonstatistical information. As more nonstatistical information is brought to bear, the systematic empirical evidence can often answer the key questions at issue in litigation more precisely."); David Scheffman and Mary Coleman, "FTC Perspectives on the Use of Econometric Analyses in Antitrust Cases," chapter V in *Econometrics: Legal, Practical, and Technical Issues* (J. Harkrider, ed.), American Bar Association, Antitrust Section, 2005, 115-129 at 118 ("An econometric study useful for decision-making at the FTC ... [u]tilize[s] an economic model that is consistent with the key institutional factors and the facts in the setting being modeled and that generates results that can be evaluated in the context of other evidence.").

<sup>68</sup> In the 2010-13 Cable Allocation, the Judges wrote that they were "struck by the relative consistency of the results across the accepted methodologies" they considered, including results of surveys of CSO executives. 2010-13 Final Cable Determination at 3610. In the 2004-2005 proceeding, the Judges relied on survey results in their final determination, but viewed the regression analysis offered by Dr. Waldfoegel as providing "additional useful, independent information about how cable operators may view the value of adding distant signals based on the programming mix on such signals." 2004-05 Final Cable Determination at 57068.

<sup>69</sup> 2010-13 Final Cable Determination at 3583.

<sup>70</sup> 2004-05 Final Cable Determination at 57073-57074.

category definitions, MGC argues that there is a lack of inherent difference across a wide-range of sports-related programming. MGC has not, however, applied this same logic in proposing changes to other category definitions. Consider, for example, movies and drama series, which can be included in either the Programming Supplier category or the Public Television category, depending on the signal on which they are carried. While the current treatment of these types of programming is consistent with how system operators value signals when making retransmission decisions, applying MGC's proposal on a consistent basis also would require altering how these programs are categorized. Implementing MGC's logic consistently across all programming would result in claimant groups that are not consistent with MVPDs' ordinary decision-making process. The result would be a cascading of the problems I have explained above, thereby reducing the accuracy and reliability not only of estimates of the relative value of sports-related programming but of all or virtually all other programming categories.

**D. MGC's Proposed Changes to the Claimant Categories Would Increase Transaction Costs**

61. The longstanding claimant group definitions have resulted in relatively few Distribution Phase disputes among members of the groups. This helps to minimize the transaction costs associated with distributing royalties. By combining programming with highly disparate values into a single claimant group, the proposal put forward by MGC would lead to an increased likelihood of more Distribution Phase disputes, thereby increasing the transaction costs of these proceedings.

62. Historically, the Allocation Phase of these proceedings have largely avoided litigated disputes among members of claimant groups. Among satellite royalties distributed for 1999 through 2009 and cable royalties distributed for 2004 through 2009, the only Allocation Phase disputes have been limited to MGC (and its predecessor, the Independent Producers Group) disputing their share of the Settling Devotional Claimants' and Programming Suppliers' awards.<sup>71</sup> The Judges were not required to intervene in the

---

<sup>71</sup> Distribution of 1998 and 1999 Cable Royalty Funds, Docket No. 2008-1 CRB CD 98-99 (Phase II), 80 FR 13423-13444 (hereinafter "Jan. 2015 Phase II Determination"); Order Granting IPG's Motion for Final



distribution of funds within other claimant groups. The limited involvement of the Judges in resolving Distribution Phase disputes reduces transaction costs.

63. Economic analysis of market outcomes centers on the concept of “equilibrium.” Outcomes where no market participant believes he could be made better off by making a change are consistent with the economic concept of equilibrium.<sup>72</sup> Notably, the claimant groups utilized in the Allocation Phase proceedings have remained nearly unchanged for decades and have resulted in few litigated Distribution Phase proceedings.<sup>73</sup> To an economist, this indicates that the vast majority of rights holders believe that the claimant groups are defined in a way that maximizes the economic value of their rights, and they do not believe they would be better off having their programs (or those of other rights holders) moved into a different claimant group.

64. Participants in CRB proceedings have strong economic incentives to ensure the process whereby relative values are assigned and royalties are allocated is efficient and accurate. This includes ensuring accurate definition of the claimant groups, which are central to the Allocation Phase of the proceedings. Economic principles tell us that members of these groups would seek to leave their current group if they believed they were receiving less than the fair value of their programming.<sup>74</sup>

65. Contrary to what an economist would expect to see if there were meaningful differences in relative value among members of each claimant group, the claimant groups

---

Distribution of 1999 Cable Royalties (Devotional Category), In re: Distribution of 1998-1999 Cable Royalty Funds, Docket No. 2008-1 CRB CD 1998-1999 (Phase II) (June 12, 2017); Order Denying IPG Motion for Partial Distribution, In Re: Distribution of 2000-03 Cable Royalty Funds, Docket No. 2008-2 CRB CD 2000-03 (Phase II), In Re: Distribution of 1998-99 Cable Royalty Funds, Docket No. 2008-1 CRB CD 1998-99 (Phase II), In Re: Distribution of 2004-09 Cable Royalty Funds, Docket No. 2012-6 CRB CD 2004-09 (Phase II), In Re: Distribution of 1999-2009 Satellite Royalty Funds, Docket No. 2012-7 CRB SD 1999-2009 (Phase II) (February 11, 2014); Feb. 2019 Phase II Determination.

<sup>72</sup> Graham Bannock, R.E. Baxter and Ray Rees, *The Penguin Dictionary of Economics* (Penguin Books, 2<sup>nd</sup> ed., 1978) at 154.

<sup>73</sup> Since 1999, Distribution Phase proceedings have been limited to MGC (and its predecessor) disputing its share of the Program Supplier and Settling Devotional Claimants categories. Jan. 2015 Phase II Determination; Feb. 2019 Phase II Determination.

<sup>74</sup> Lester G. Telser, *A theory of efficient cooperation and competition* (Cambridge University Press, 1987) at 50-51.

have remained stable for decades, with most claimant groups having few distribution disputes following the allocation proceedings. Since 1999, Distribution Phase proceedings have been limited to MGC (and its predecessor) disputing its share of the Program Supplier and Settling Devotional Claimants categories.<sup>75</sup> Therefore, the claimant groups can be described as being consistent with the economic concept of a “stable coalition.”<sup>76</sup>

66. The fact that claimant groups have developed stable coalitions provides strong, direct economic evidence that the claimant groups are made up of similarly situated programming. Because rights holders’ behavior is consistent with having no incentive to change, this suggests that the claimant groups that have been historically relied upon in the Allocation Phase are consistent with an economic equilibrium. This reduces transaction costs and decreases the likelihood of additional Distribution Phase disputes. As I explained above, MGC proposes to introduce substantial increased heterogeneity into a newly-defined “programming of a predominantly sports nature” category. I also explained that MGC’s proposed re-categorization of sports programming would inevitably prompt changes in the definitions of most or all other programming categories. The result would be a substantial and broad-based increase in disparities within each claimant group. For the reasons outlined in this section, the proposed change would lead to higher transaction costs and make settlement and resolution less likely.

**E. MGC’s Proposed Changes to the Claimant Categories Would Make Contested Distribution Phase Proceedings More Difficult to Resolve**

67. As explained above, MGC’s proposed change to the JSC definition would result in a highly heterogeneous sports-related programming category. This new category would include JSC programming that drives MVPD carriage decisions as well as “other sports”

---

<sup>75</sup> See n. 73 *supra*.

<sup>76</sup> Joseph Greenberg, “Coalition Structures,” chapter 37 in *Handbook of Game Theory with Economic Applications* (R. Aumann and S. Hart, eds.), Elsevier, 1994, 1306-1337 at 1313-1316; Erich Prisner, *Game Theory through Examples* (Mathematical Association of America, 2014) at 255; Lester G. Telser, “The Usefulness of Core Theory in Economics,” *Journal of Economic Perspectives* 8(2) (Spring 1994):151-164 at 154 (“In core theory, coalitions compete for members by making offers to individuals to induce them to join the coalition. The grand coalition, which includes all the members, can survive only by offering terms that are at least as good as any feasible offer coming from a subcoalition.”).

programming that is demonstrably far less valuable to MVPDs.<sup>77</sup> Contrary to MGC's suggestion, this less valuable non-JSC sports-related programming would not garner a higher value merely from sharing an Allocation Phase category with JSC programming. Rather, this less-valued content would remain relatively less valuable to MVPDs than JSC content, and a methodology would need to be developed to measure the premium that the live professional and collegiate team sports programming earns but which other sports-related programming does not. Thus, one would need a methodology similar to that used in the existing Allocation Phase. Having to conduct a regression, a survey, or another methodology capable of calculating the differing premiums would be both highly duplicative and highly wasteful given that the exercise is already performed in the Allocation Phase. Given that MGC's proposed changes would not improve the Allocation Phase relative valuation, there is no basis to make a change that would not only weaken the relative valuation but also make the Distribution Phase more difficult and more costly.

## **V. DETERMINATION OF CLAIMS ELIGIBILITY**

### **A. Overview**

68. The Judges inquired as to the “necessity and feasibility of proposed approaches to the identification and treatment of invalid claims, and the consonance of their proposed approaches with the establishment of relative value.”<sup>78</sup> As a matter of economics, there is no reason or need to change the existing practice of determining validity issues as part of the Distribution Phase. Determinations of validity do not impact relative market valuation because valuation turns on changes in the relative marginal value of categories, not on the volume of valid claims. The fact that there could be some invalid programs in a given category would not change the overall valuation of the category. Moreover, moving the determination of claims validity to the Allocation Phase would create perverse incentives to challenge validity as a tactic to increase leverage, and thus would generate expensive discovery disputes and significantly delay the Allocation Phase.

---

<sup>77</sup> See 2010-13 Final Cable Determination at Table 12.

<sup>78</sup> Notice of Inquiry at 71854.

## **B. Resolving Claims Validity Does Not Impact the Relative Valuation of Claimant Categories**

69. Program Suppliers contend that their proposal to resolve the validity of claims during the Allocation Phase would increase measurement accuracy, but this view is based on the mistaken premise that valuation is driven principally by the number of programs. This premise is incorrect as a matter of economics.<sup>79</sup> The Judges recognized this in their 2010-13 Cable Allocation when they rejected a proposal by Program Suppliers' expert Dr. Jeffrey Gray to measure market value based on program volume shares. The Judges gave this analysis no weight due to Dr. Gray's own admission that volume alone was not sufficient to determine relative market value.<sup>80</sup>

70. Valuation is driven by differences in the relative economic worth of different types of programming to market participants. A fundamental economic principle is that value in a free market is determined "at the margin" by the maximum amount that a buyer is willing to offer and the minimum amount that a seller is willing to accept for the last unit of the product or service that they are exchanging.<sup>81</sup> Economists use the term "marginal utility" to refer to this "at the margin" valuation.<sup>82</sup> An important economic principle is diminishing marginal utility,<sup>83</sup> which states that the marginal (or incremental) utility from each additional unit demanded or consumed declines. In the present context, this principle implies that MVPDs—whose demand for content is derived from the preferences of their

---

<sup>79</sup> Program Suppliers allege that the longstanding treatment of invalid claims "allows Allocation Phase Claimant Groups to improperly inflate their Allocation Phase claims with ineligible works, thereby diverting statutory license royalties from eligible claimants in other Allocation Phase Claimant Groups." PS Brief at 5-6.

<sup>80</sup> 2010-13 Final Cable Determination at n. 148.

<sup>81</sup> Fred M. Gottheil, *Principles of Economics* (7th ed., 2013), South-Western Cengage Learning, 2013 at 111 ("How much people value a good depends upon the utility they derive *from the last one consumed*.") (emphasis in original).

<sup>82</sup> Michael L. Katz and Harvey S. Rosen, *Microeconomics* (Irwin/McGraw Hill, 3rd ed., 1998) at 49 (Marginal utility is "[t]he change in total utility associated with consumption of one additional unit of a good.")

<sup>83</sup> N. Gregory Mankiw, *Principles of Microeconomics* (South-Western Cengage Learning, 5th ed., 2008) at 465 ("The *marginal utility* of any good is the increase in utility that the consumer gets from an additional unit of that good. Most goods are assumed to exhibit *diminishing marginal utility*: The more of the good the consumer already has, the lower the marginal utility provided by an extra unit of that good.").

subscribers—will value most highly the initial programs in a particular category, while each subsequent addition to the category will contribute incremental value at a diminishing rate. It follows that adding (or subtracting) a few extra units—or here, program rights claims—would have no material effect on the marginal utility of a distant signal to an MVPD, and therefore would have no discernable effect on market values. This is particularly true when, as here, all of the major rights holders have filed claims and there is no reason to question the validity of such claims (the exception being claims of MGC, many of which I understand have historically been shown to be invalid).

71. For this reason, Program Suppliers’ premise that a given category with invalid claims would have its value inflated is incorrect. The Allocation Phase measures the relative value of programming across categories. Differences in relative value across categories is not driven by the volume of programs, but rather by the premium that MVPDs place on certain categories of programming in attracting and retaining subscribers. As the Judges have noted previously, the programming comprising a given category is “relatively homogenous.”<sup>84</sup> As a matter of economics, given the principal of diminishing marginal utility, one would not expect that the inclusion or exclusion of a program of questionable validity in a given category to have an impact on that category’s relative value.

72. Consider, for example, the MVPD surveys that “have long played a central role in assisting adjudicators in assessing relative market value of cable programming.”<sup>85</sup> These surveys ask MVPD executives to allocate expenditures across categories of programming, rather than specific programs within each of those categories. Because survey respondents are evaluating categories as a whole, the validity of a single claim would not affect the resulting relative value estimates.

73. Even if one did believe there were value attributable to invalid claims, it would be economically logical to reallocate the value associated with such claims within the same claimant group. The programs that comprise a given claimant group share salient characteristics that drive relative value. As I noted previously, the live professional and

---

<sup>84</sup> Feb. 2019 Phase II Determination at 16042.

<sup>85</sup> 2010-13 Final Cable Determination at 3582.

college team sports broadcasts that comprise the JSC category share key attributes such as large and passionate fan bases, longstanding and continuing rivalries, wide distribution, and regularly scheduled seasons leading up to annual post-season championships.<sup>86</sup> If hypothetically there were a program within the JSC category with an invalid claim, the value ascribed to that claim would be derived from the premium that JSC programming as a category derives due to its superior ability to retain and attract subscribers. To the extent there is anything to “reallocate,” it makes economic sense to do so with the same claimant group.

74. If Program Suppliers’ proposal were adopted and participants to the proceeding attempted to assess the validity of each individual claim in the Allocation Phase, a methodology for valuing each invalid claim would be required. One cannot assume, for example, that an unclaimed program is as valuable as a claimed program. Indeed, as an economic matter, the fact that no one has made a claim for the program suggests that the copyright owner does not ascribe significant value to the claim, or believes that the costs of participating in the proceeding exceed the claims value, with the exception of what I understand to be rare instances where a significant rights holder inadvertently failed to file a material claim.<sup>87</sup>

**C. Program Suppliers’ Proposal Would Create Improper Incentives and Would Increase the Costs and Risks of Delay during the Allocation Phase**

75. While Program Suppliers’ proposal would not improve the accuracy of relative market valuations, the proposal would lead to a large-scale increase in transaction costs. These increased costs would likely include more numerous bargaining disputes, extended delays due to haggling, and an increased risk of hold-ups.<sup>88</sup> Without any potentially

---

<sup>86</sup> See ¶33 *supra*.

<sup>87</sup> As a matter of economics, when the expected transaction costs exceed the benefit of participating in a transaction, the transaction will not take place. N. Gregory Mankiw, *Principles of Microeconomics* (South-Western Cengage Learning, 5<sup>th</sup> ed., 2008) at 219.

<sup>88</sup> Economists describe the “hold-up” problem as a scenario where a party is so focused on increasing his own bargaining power that an economically inefficient outcome results. Economic theory tells us that the hold-up problem reduces the incentive to make investments. Samuel Bowles, *Microeconomics: Behavior, Institutions, and Evolution* (Princeton University Press, 2004) at 340-341.

offsetting gain in measurement accuracy, the net result of Program Suppliers' proposal would be an increase in cost and reduction in efficiency in the allocation and distribution of cable and satellite royalties.

76. Under Program Suppliers' proposal, no royalties could be allocated or distributed until such time as every single claim's validity had been determined. This would incentivize rights holders to increase their bargaining leverage by questioning the validity of a larger number of claims. If all parties are incentivized to maximize the invalidity of claims in other categories in order to increase their own bargaining leverage, there will be a large increase in expensive and time-consuming discovery requests concerning claims validity, as well as expensive and time-consuming disputes regarding the validity of claims. The increased costs and delays that would ensue from all claimants being incentivized to take on the validity of claims in other categories would run counter to Copyright Act's public policy goal of reducing the transaction costs associated with carriage of distant signals.

77. Compare the increased transaction costs and disputes that would result from Program Suppliers' proposal to the low transaction costs and high rates of resolution that flow from the current process of resolving validity issues in the Distribution Phase. For the most part, the parties have avoided validity disputes and have entered into efficient Distribution Phase settlements. This strongly suggests that, with limited exceptions, members of a given claimant group do not have serious questions about the validity of claims of other members of the group.

78. Similar to MGC's proposed changes to the claimant group definitions, Program Suppliers' proposal would impact the Bortz survey and other constant-sum surveys that have been relied upon by the Judges. The 2014-17 Bortz Survey has already been performed without asking respondents to value individual claims separately.

## **VI. CONCLUSION**

79. MGC has proposed the creation of a new claimant category with "programming of a predominantly sports nature" combining programming of widely disparate value.

Program Suppliers have proposed moving questions about the validity of individual claims into the initial Allocation Phase of cable and satellite royalty proceedings.

80. Neither of these proposed changes would lead to more reliable measurement of the relative market values of programming categories. MGC's proposal to combine programming of widely disparate value into a single sports-related category ignores the distinct role that Joint Sports Claimants' programming has long played in system operators' retransmission decisions. The creation of a catchall category that combines programming of more heterogeneous nature and highly dissimilar value would be antithetical to the goal of accurately measuring relative market value. If adopted, MGC's proposal would inevitably require a cascade of changes to other programming categories in an effort to restore a semblance of methodological logic and cohesion to how programming is apportioned across other categories. While these proposed changes would not lead to more accurate measurement of relative market values, transaction costs and the likelihood of within-category disputes would increase.

81. Program Suppliers' proposal to assess the validity of individual claims at the Allocation Phase would, likewise, increase the transaction costs associated with the proceedings without leading to a more reliable measurement of relative market value. Program Suppliers' proposal mistakenly presupposes that valuation is driven by the number of valid programs rather than by the intrinsic worth of particular programming categories to system operators as an input to retaining and attracting paid subscribers. Under Program Suppliers' proposal, the Judges would need to attempt to determinate the validity of each individual claim prior to commencing any analysis of market value, and this would give individual rights holders strong incentives to hold-out for allocations that exceed their relative market value. This would lead to protracted delays, less accurate valuations, loss of efficiency, and higher costs associated with dispute resolution.



I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.



---

Andrew R. Dick, Ph.D.

Dated: March 16, 2020

Washington, D.C.

**Andrew R. Dick**  
Vice President

PhD, Economics  
University of Chicago

MA, Economics  
University of Chicago

BA, Economics  
and Political Science  
University of Toronto

Andrew Dick, a vice president in the Competition Practice at Charles River Associates, has deep practical experience that spans both mergers and acquisitions as well as antitrust litigation. Dr. Dick routinely assists clients by assessing antitrust risks at the pre-transaction stage, preparing complex economic analyses in support of proposed transactions reviewed by US and foreign antitrust agencies, providing economic consulting assistance during litigation, and serving as a testifying expert in litigated cases. Dr. Dick has applied his antitrust expertise to cases in a broad array of industries including broadcast and cable media, building products, casino gaming, chemicals and pharmaceuticals, computer software and services, consumer products, manufacturing, forestry products, payment networks, retailing and distribution services, sports entertainment, steel products, and transportation services among many others. Dr. Dick has led or co-led CRA project teams on numerous high-profile transactions including Office Depot-OfficeMax, Albertson's-Safeway, Live Nation-Ticketmaster, General Electric-Alstom, NBC Universal-Comcast, Caesars-Harrah's, Whole Foods Market-Wild Oats, and Sysco-US Foods. In litigated matters, Dr. Dick has submitted expert analyses pertaining to allegations of monopolization, collusion, and foreclosure as well as other economic issues.

Before joining CRA in 2003, Dr. Dick was acting chief of the Competition Policy Section of the DOJ's Antitrust Division. Prior to that, he was a member of the UCLA faculty and was a research fellow at the University of Chicago's Graduate School of Business. Dr. Dick has spoken at conferences and published widely on antitrust topics such as unilateral and coordinated effects, merger efficiencies and business justifications for vertical and horizontal restraints. His articles have appeared in such leading publications as *Antitrust Law Journal*, *Journal of Law and Economics*, and *Antitrust Magazine*.

## **Selected antitrust engagements**

- Agriculture—crop protection, fertilizer, livestock
- Business services—book publishing, business continuity/disaster recovery services, commercial printing, document destruction, food processing, livestock ranching, professional services, waste disposal services
- Computer software and hardware—CAD/CAM, desktop software, enterprise software, scanners, speech recognition software

- 
- Consumer products and services—alcoholic beverages, car rentals confectionery, consumer lending, cosmetics, educational services, film, lawn and garden products, luncheon meats, office supplies
  - Defense—defense services procurement, satellite imaging
  - Distribution—building supply products distribution, food service distribution, fertilizer distribution, grocery wholesaling, office supplies distribution, paper products distribution, pharmaceutical distribution, retail supplies distribution
  - Electronic payment systems—ATM networks, credit and debit card networks, medical insurance claims networks
  - Energy—electricity, natural gas, oilfield services
  - Entertainment and media—broadcast and cable television programming and distribution, casino gaming, concert promotion services, digital media, movie theaters, outdoor media, television and radio advertising
  - Equipment and machinery—aircraft parts, electrical equipment, farm equipment, mining and drilling apparatus, railcars, semiconductor manufacturing equipment, vehicle engines, water purifiers
  - Financial services—automotive lending, credit and debit networks, installment lending, rent-to-own
  - Forestry products—corrugated packaging materials, engineered wood products, label stock, linerboard and containerboard, paperboard, publication and printing paper, specialty paper products, structural panels (OSB, plywood), tissue products, wood pulp
  - Healthcare—health insurance, healthcare claims networks, medical devices, PBMs, pharmaceuticals manufacturing, pharmaceuticals wholesaling, physician services
  - Industrial and building products—building distribution services, cement and ready-mix, containerboard, crop protection, fertilizers, glass reinforcements, gypsum wallboard, hot and cold rolled steel, industrial chemicals, insulation, pool supplies, road salt, specialty steels
  - Manufacturing—automotive equipment, builder's hardware, engines, explosives detection equipment, household appliances, mining equipment, packaging materials, photographic inks, turbines and generators
  - Retail—apparel, department stores, discount stores, drug stores, gasoline stations, grocery retailers, mass merchandisers, office supply superstores, online retailing, retail supplies distribution
  - Sports—amateur sports associations, college sports media rights, professional sports leagues, sports gambling
  - Telecommunications—cellular telephone location systems, satellite communications, telecommunications equipment
  - Transportation—airlines, automotive equipment, freight-forwarding, rail transportation, transportation equipment manufacturing

## Expert testimony since 2010

*In Re: Distribution of Satellite Royalty Funds*, Copyright Review Board No. 14-CRB-0011-SD (2010-13). (Client: Joint Sports Claimants) Expert reports, March 22, 2019, June 7, 2019 and August 26, 2019.

*Westlake Services LLC d/b/a Westlake Financial Services v. Credit Acceptance Corporation*. US District Court for the Central District of California. (Client: Credit Acceptance Corporation) Expert reports, May 5, 2017 and June 30, 2017. Deposition testimony July 17, 2017.

*Cal. Ex. Rel. Lockyer v. British Columbia Power Exchange Corp.* FERC Docket EL02-71-057. (Client: Shell Energy North America) Expert Declaration, February 1, 2017. Deposition testimony March 24, 2017. Hearing testimony April 26, 2017.

*The Elite Rodeo Association d/b/a Elite Rodeo Athletes, Trevor Brazile, Bobby Mote, and Ryan Motes individually and on behalf of a class of similarly situated individuals v. Professional Rodeo Cowboys Association Inc.* US District Court for the Northern District of Texas, Dallas Division. (Client: Professional Rodeo Cowboys Association) Expert Declaration, December 4, 2015. Trial testimony December 29, 2015.

*Expert Declaration on Behalf of Zuffa, LLC Submitted to the Federal Trade Commission*. December 1, 2011.

*Miguel V. Pro and Davis Landscape, Ltd., individually and on behalf of all others similarly situated v. Hertz Equipment Rental Corporation*. US District Court for the District of New Jersey. (Client: Hertz Equipment Rental Corp.) Expert report, May 19, 2011. Deposition testimony July 27, 2011.

*Amylin Pharmaceuticals, Inc. v. Eli Lilly and Company*. US District Court for the Southern District of California. (Client: Amylin Pharmaceuticals) Expert declaration, May 13, 2011.

*In Re: Delta/AirTran Baggage Fee Antitrust Litigation*. US District Court for the Northern District of Georgia, Atlanta Division. (Client: AirTran) Expert reports, January 7, 2011 and February 4, 2011. Deposition testimony, February 25, 2011.

*Affinion Benefits Group, LLC v. Econ-O-Check Corp.* US District Court for the Middle District of Tennessee, Nashville Division. (Client: Affinion Benefits Group) Expert declaration, October 22, 2010. Expert report, October 2, 2010.

## Government experience

2002–2003      *Acting Chief of Competition Policy*, Antitrust Division, US Department of Justice

1999–2002      *Assistant Chief of Competition Policy*, Antitrust Division, US Department of Justice

Dr. Dick shared responsibility for supervising the casework of 50 antitrust economists, managing the preparation of testifying experts for litigation, coordinating analysis between economic and legal staffs, and briefing the Assistant Attorney General on enforcement recommendations. Recipient of the Assistant Attorney General's Award of Distinction (2002).

1996–1999      *Staff Economist*, Antitrust Division, US Department of Justice

Dr. Dick was the lead economist on numerous merger reviews and investigations into horizontal agreements, vertical restraints, and alleged unfair trade practices.

## Teaching and research experience

- 1989–1996      *Assistant Professor*, University of California, Los Angeles, Department of Economics
- Dr. Dick taught graduate- and undergraduate-level industrial organization at UCLA and twice received the Warren C. Scoville Distinguished Teaching Award.
- 1991              *Visiting Assistant Professor*, University of Chicago, Graduate School of Business
- John M. Olin Faculty Research Fellow in residence at the Center for the Study of the Economy and the State.
- 1995–1996      *Assistant Professor of Economics*, Claremont McKenna College
- Dr. Dick taught courses in industrial organization and microeconomic analysis.

## Professional service

- 2005–2015      *Associate Editor*, *Antitrust Magazine*
- 1995–2000      *Associate Editor*, *International Journal of Industrial Organization*

## Antitrust publications

- “Coordinated Effects in Merger Analysis.” *Antitrust Economics for Lawyers*. LexisNexis, 2017.
- “Findings from the Second Request Compliance Burden Survey.” With Peter Boberg. *The Threshold*, Summer 2014; pp. 26-37.
- “The Office Depot-OfficeMax Merger and the Changing Retail Landscape.” With Kevin Arquit, Matthew Reilly, Andrew Lacy and Peter Boberg. *Global Competition Review USA*, November 25, 2013.
- “Merger Policy Twenty-Five Years Later: Unilateral Effects Move to the Forefront.” *Antitrust Magazine*, fall 2012; pp. 25–32.
- “Counseling on Complex Issues.” Panelist in *Antitrust Magazine* symposium, spring 2008; pp. 6–24.
- “Cartels.” *The Concise Encyclopedia of Economics*, ed. David R. Henderson. Liberty Fund Publishing, 2008; pp. 61–63.
- “Regression Analysis.” With Peter Boberg. *Antitrust Magazine*, Fall 2005; pp. 85–89.
- “The Effect of Format Changes and Ownership Consolidation on Radio Station Outcomes.” With Charles J. Romeo, *Review of Industrial Organization*, Vol. 27, No. 4, December 2005; pp. 351–86.

"Presumptions, Assumptions and the Evolution of US Antitrust Policy." With Gregory S. Vistnes. *Trade Practices Law Journal*, Vol. 13, No. 4. December 2005; pp. 238–243.

"Coordinated Effects Analysis: The *Arch Coal* Decision." *Antitrust Source*, March 2005; pp. 1–15.

"If Cartels Were Legal, When Would Firms Fix Prices?" *How Cartels Endure and How They Fail: Studies of Industrial Collusion*, ed. Peter Grossman. Edward Elgar, 2004; pp. 144–173.

"Coordinated Interaction: Pre-Merger Constraints and Post-Merger Effects." *George Mason University Law Review*, Vol. 12, No. 1, Fall 2003; pp. 65–88.

"The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers." With William J. Kolasky. *Antitrust Law Journal*, Vol. 71, No. 1, 2003; pp. 207–251.

"Cartels and Tacit Collusion." *The New Palgrave Dictionary of Economics and the Law*, ed. Peter Newman; Macmillan Press, London, 1998; pp. 206–211.

"When Are Cartels Stable Contracts?" *Journal of Law and Economics*, Vol. 39, No. 1, April 1996; pp. 241–84.

"Identifying Contracts, Combinations and Conspiracies in Restraint of Trade." *Managerial and Decision Economics*, Vol. 17, No. 2; March–April 1996; pp. 203–216. Reprinted in *Economic Inputs, Legal Outputs: The Role of Economists in Modern Antitrust*, ed. Fred McChesney (Wiley & Sons, 1998); pp. 11–24.

"Japanese Antitrust: Reconciling Theory and Evidence." *Contemporary Policy Issues*, Vol. 11, No. 2, April 1993; pp. 50–61.

"Are Export Cartels Efficiency-Enhancing or Monopoly-Promoting?" *Research in Law and Economics*, Vol. 15, Summer 1992; pp. 89–127.

## Selected other publications

"US–Japan Telecommunications Trade Disputes: The Role of Regulation." *The Effects of US Trade Protection and Promotion Policies*, ed. Robert C. Feenstra, University of Chicago Press, 1997; pp. 117–157.

"Explaining Managed Trade as Rational Cheating." *Review of International Economics*, Vol. 4, No. 1, February 1996; pp. 1–16.

*Industrial Policy and Semiconductors: Missing the Target*. American Enterprise Institute, 1996.

"Does Import Protection Act as Export Promotion? Evidence from the United States." *Oxford Economic Papers*, Vol. 46, No. 1, January 1994; pp. 83–101.

"Accounting for Semiconductor Industry Dynamics." *International Journal of Industrial Organization*, Vol. 12, No.1, January 1994; pp. 35–51.

"Strategic Trade Policy and Welfare: The Empirical Consequences of Foreign Ownership." *Journal of International Economics*, Vol. 35, No. 3-4; November 1993; pp. 227–249.

"An Efficiency Explanation for Why Firms Second Source." *Economic Inquiry*, Vol. 30, No. 2, April 1992; pp. 332–354. Co-winner of the *Economic Inquiry* best article of the year award.

"The Competitive Consequences of Japan's Export Cartel Associations." *Journal of the Japanese and International Economies*, Vol. 6, No. 3; September 1992; pp. 275–298.

"Learning-by-Doing and Dumping in the Semiconductor Industry." *Journal of Law and Economics*, Vol. 34, No. 1; April 1991; pp. 133–160.

**Exhibit D - Declaration of James M. Trautman**



**Before the  
COPYRIGHT ROYALTY JUDGES  
The Library of Congress**

*In re*

**NOTICE OF INQUIRY REGARDING  
CATEGORIZATION OF CLAIMS FOR  
CABLE OR SATELLITE ROYALTY  
FUNDS AND TREATMENT OF  
INELIGIBLE CLAIMS**

**Docket No. 19-CRB-0014-RM**

**DECLARATION OF JAMES TRAUTMAN**

**MARCH 16, 2020**

## **I. Qualifications**

1. I am Managing Director of Bortz Media & Sports Group, Inc. (Bortz). I am currently retained by the Joint Sports Claimants (JSC) to provide market research and analytical support in connection with the 2014-17 cable royalty proceeding. I have previously submitted written and oral testimony in the 2010-13 cable and satellite royalty allocation proceedings as well as in prior cable royalty proceedings. My testimony has included discussion of the methodology, results and history of the cable operator surveys that Bortz conducts for JSC (Bortz surveys), as well as consideration of other factors associated with programming value in the distant signal marketplace. Appendix A to this testimony sets forth my qualifications as an expert in market research—including survey research and valuation in the cable, broadcast and television programming industries.

## **II. Introduction and Summary**

2. It is my understanding that two parties, Multigroup Claimants (MGC) and Program Suppliers, have proposed changes to longstanding conventions and practices used in Section 111 and 119 royalty distribution proceedings. First, MGC proposes to expand the definition of the JSC category to include not only live professional and collegiate team sports but also a broad array of other sports related content. Second, Program Suppliers seeks to reverse what is commonly referred to as the Unclaimed Funds Ruling, whereby all programming within a given category is treated as validly claimed for purposes of assessing relative market value in the Allocation Phase, and issues of claims validity are addressed in the Distribution Phase.

3. In my opinion, neither proposal should be adopted. As an initial matter, in reliance on approximately forty years of practice, the Bortz surveys for the pending 2014-17 cable royalty distribution proceeding have already been conducted in anticipation of the continued application

of the Unclaimed Funds Ruling and the continued use of the standard claimant category definitions. Bortz endeavors to conduct these surveys close in time to the year in question to maximize measurement accuracy. These surveys cannot be redone years later—more than five years after the first royalties at issue were paid—in order to use revised claimant category definitions or somehow to account for unclaimed programming or invalid claims.

4. Moreover, contrary to MGC's contention, the current definitions are well understood by industry participants and are consistent with how they make valuations. Over the years, I have listened to thousands of interviews performed as part of the Bortz surveys. Survey participants have had no difficulty understanding the current JSC definition, which is limited to live professional and college team sports. The ability of survey participants to assign a relative value to the JSC category indicates that the category is consistent with how industry participants make their decisions. Tellingly, survey participants have consistently valued JSC programming at a far higher level than other types of programming.

5. If MGC's proposal were adopted, the results of future surveys would provide less information about relative value. An expanded JSC category definition would be very heterogeneous, with both high value live professional and collegiate team sports as well as low value non-JSC sports related content such as sports highlight shows, rebroadcasts of old games, and high school sports. The results would not distinguish between the valuable content and the low value content and would therefore make it more, rather than less, difficult to allocate value to the different claimants that would be part of the broadened category.

6. Finally, if the Judges were to adopt MGC's proposed change to the JSC category definition, it would be necessary to similarly adjust the other claimant categories as well.

Otherwise, the revised JSC category definition would be inconsistent with the other category definitions, introducing methodological inconsistency and confusion.

### **III. The 2014-17 Bortz Surveys Have Already Been Conducted**

7. The Bortz surveys have provided important evidence of relative marketplace value in cable royalty proceedings for more than thirty-five years. The Judges and their predecessors have repeatedly relied (sometimes primarily) on the Bortz surveys in making the Allocation Phase determinations.<sup>1</sup>

8. The Bortz surveys are reliable and useful measures of relative market value for at least two key reasons. First, the surveys are conducted for each royalty year and are undertaken in a timely manner (*i.e.*, starting in the year following the royalty year in question), allowing cable operators to respond to the survey with a clear understanding of what drove their decision making during the relevant period.<sup>2</sup> Second, the surveys are specifically designed to provide a relative market value estimate for the programming represented by each of the participating claimants. That is, the cable operator respondents are asked to value buckets of programming that are derived directly from the claimant category definitions agreed to by the parties.

---

<sup>1</sup> Distribution of Cable Royalty Funds, 84. Fed. Reg. 3552, 3610 (Feb. 12, 2019) (“The Bortz and Horowitz Surveys, together with the McLaughlin ‘Augmented Bortz’ results and the Crawford and George regressions, taking into account the confidence intervals (when available) surrounding the point estimates, define the . . . ranges of reasonable allocations for each program category in each year”); Distribution of the 2004 and 2005 Cable Royalty Funds, 75 Fed. Reg. 57063, 57066 (Sept. 17, 2010) (“[T]he Judges find the Bortz study to be the most persuasive piece of evidence provided on relative value in this proceeding”); Distribution of 1998 and 1999 Cable Royalty Funds, 69 Fed. Reg. 3606, 3609 (Jan. 26, 2004) (“[T]he Panel determined that the Bortz survey best projected the value of broadcast programming in the hypothetical marketplace . . .”).

<sup>2</sup> The Judges’ predecessors have twice expressed the importance of conducting these surveys close in time to the year at issue. 1983 Cable Royalty Distribution Proceeding, 51 Fed. Reg. 12792, 12808 (Apr. 15, 1986); 1989 Cable Royalty Distribution Proceeding, 57 Fed. Reg. 15286, 15300 (Apr. 27, 1992).

9. As such, in order to maximize their utility in providing evidence of relative value, Bortz surveys for each of the years 2014-17 have already been completed based on the reasonable expectation that the Judges would continue to apply the standard claimant category definitions. The 2014-17 Bortz surveys cannot be rerun at this time to incorporate new claimant category definitions.

10. Nor can the Bortz surveys be rerun to address a departure from the long-standing Unclaimed Funds Ruling. The Bortz surveys do not specifically identify to respondents what programming is included/claimed within each category and what is not. It is not necessary to do so under the Unclaimed Funds Ruling. Tens of thousands of compensable broadcasts are subject to distant retransmissions each year; to list out those that are claimed and those that are not would be unmanageable.

#### **IV. The Current Claimant Category Definitions Are Consistent With Industry Decision Making**

11. MGC proposes that the existing JSC category (which is limited to “live telecasts of professional and college team sports,” of the sort claimed by JSC’s member organizations) should be modified to encompass all “programming of a predominately sports nature.”<sup>3</sup> MGC premises this proposal on the argument that the current definition is “contrary to common understanding” and “misaligned with system operator decision-making.”<sup>4</sup>

12. It is well understood in the MVPD industry that live professional and collegiate team sports programming has a distinctive ability to retain and subtract subscribers. As a result, MVPD programming executives make decisions about what JSC programming to carry and how

---

<sup>3</sup> Multigroup Claimants’ Comments on Claimant Category Definitions and Proposed Modification (“MGC Comments”), Dkt. No. 16-CRB-0009 CD (2014-17), at 15-16 (Apr. 19, 2019). A corresponding modification to the Canadian Claimants category definition is recommended in order to align this definition with the revised sports programming category.

<sup>4</sup> MGC Comments at 6, 13.

much to pay for it differently than they do for other content. Industry data as well as the Bortz surveys demonstrate that MVPDs will pay far more for JSC programming than for other types of programming. For example, the 2010-13 Bortz Surveys assigned JSC programming approximately 38% of the relative market value of the programming they carried on distant signals.<sup>5</sup> Industry experts have previously testified that these results for JSC programming are consistent with their experience and may even be conservative.<sup>6</sup>

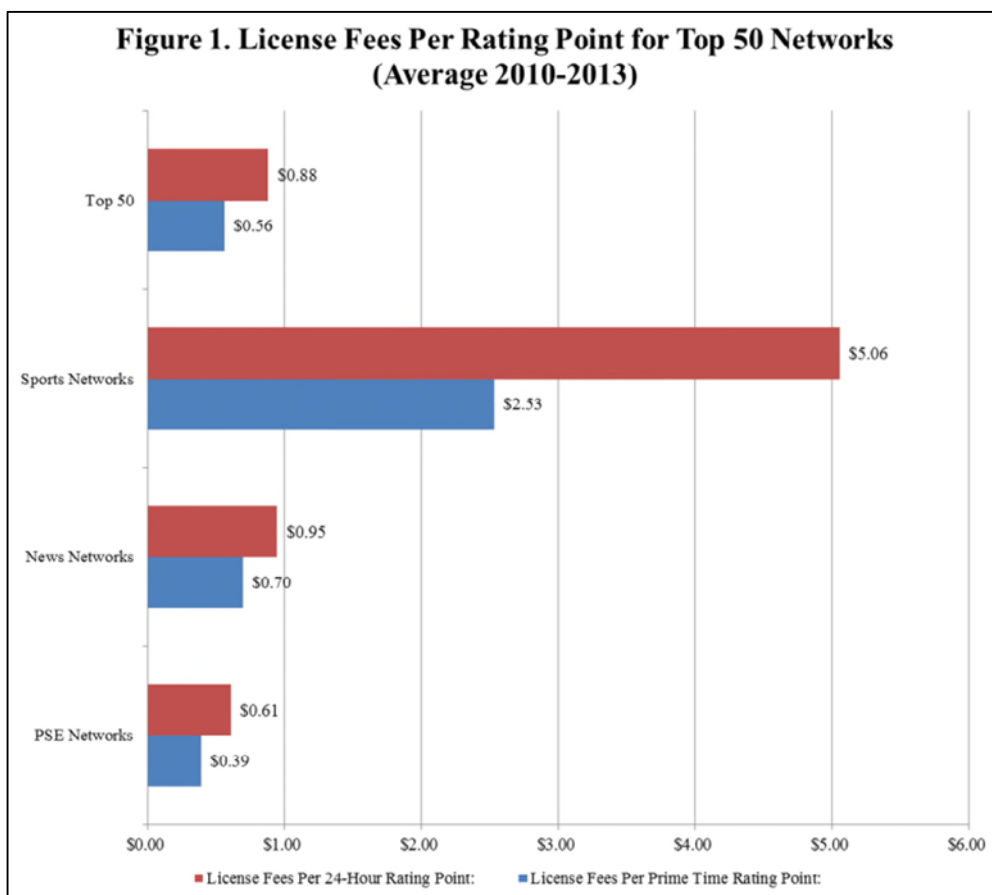
13. In connection with the 2010-13 satellite royalty distribution proceeding, I analyzed the relative amounts paid by MVPDs for cable networks carrying JSC content. Consistent with the Bortz surveys, this analysis showed that MVPDs pay between 6.5 and 8.3 times more per rating point (a measure of viewing) for cable networks featuring JSC content than for non-JSC networks:<sup>7</sup>

---

<sup>5</sup> Cable Operator Valuation of Distant Signal Non-Network Programming: 2010-13, Dkt. No. 14-CRB-0010-CD (2010-13), at 3 (Dec. 22, 2016).

<sup>6</sup> See Written Direct Testimony of Daniel M. Hartman, Dkt. No. 14-CRB-0010-CD (2010-13), at ¶ 18 (Dec. 22, 2016) (“The high relative value that the Bortz Survey accords to live professional and collegiate team sports programming (approximately 38%) is consistent with my experience in the MVPD industry, including during the years 2010 through 2013.”); Written Direct Testimony of Allan Singer, Dkt. No. 14-CRB-0010-CD (2010-13), at ¶ 27 (Dec. 22, 2016) (“[M]y experience with marketplace transactions is consistent with and confirms the high relative value of Sports found in the Bortz Report.”); Testimony of Judith Meyka, Dkt. No. 2007-3 CRB CD 2004-2005 at ¶ 17 (June 1, 2009) (“These results are generally consistent with my experience; indeed, I believe they represent a conservative estimate of the relative amounts that cable operators would have paid for the live non-network sports programming on distant signals during the years 2004 and 2005.”).

<sup>7</sup> Written Rebuttal Testimony of James M. Trautman, Dkt. No. 14-CRB-0011-SD (2010-13), at 6 (Aug. 26, 2019).



14. In conducting the Bortz surveys submitted in numerous proceedings, I have listened to literally thousands of Bortz survey telephone interviews with cable system executives over more than thirty years. It is my experience that these executives readily understand and are easily able to consider the relative value of the JSC category as currently defined. In my view, this is because the live professional and college team sports telecasts that comprise the category are among the most distinctive and valuable of all programs that system operators carry, and represent a major factor in their decision-making processes.

15. In the 2010-13 Cable Proceeding, Program Suppliers conducted a second constant sum survey (the Horowitz survey), which attempted to discern the value of non-JSC sports related

content.<sup>8</sup> Specifically, the Horowitz surveys asked respondents to assign relative value among program categories including “live, play-by-play coverage of professional and college team sports” and “other sports programming.”<sup>9</sup> Although the Horowitz survey had many problems that inflated the purported value of non-JSC sports related content, it did confirm that MVPD decision makers view JSC content and non-JSC sports related content very differently. According to Horowitz, industry participants deemed JSC programming to be approximately three and one half times more valuable than the non-JSC sports related content.<sup>10</sup>

16. MGC’s argument that it would receive “dramatically” more royalties if it was placed in the JSC category is simply incorrect. The value that industry participants place on the JSC category stems from the importance of live professional and collegiate team sports in retaining and attracting subscribers. As a general matter, non-JSC sports related content does not possess the features that make live professional and collegiate team sports so important to subscribers. For example, sports highlights shows and rebroadcasts of old games lack the compelling, live features of JSC content. That is why MVPDs pay more than \$7.00 per subscriber for ESPN but only \$0.27 for ESPN Classic.<sup>11</sup> When carriage decisions are made, it is the actual worth of the programming to the MVPD, and not the category it is placed in, that drives the programming’s relative value.

17. If the Judges were to adopt MGC’s proposal, the other claimant category definitions should also be changed. For example, if the JSC category definition is changed to include any programming related to sports, then, as a matter of consistency, all scripted programming should be placed in a single category (be it currently in Program Suppliers or PTV), all paid programming

---

<sup>8</sup> Corrected Written Direct Testimony of Howard Horowitz, Dkt. No. 14-CRB-0010-CD (2010-13) (Apr. 25, 2017).

<sup>9</sup> *Id.* at 10.

<sup>10</sup> *Id.* at 16.

<sup>11</sup> Exhibit C, Declaration of Dr. Andrew Dick, at ¶ 43.




should be placed in a single category (be it currently in Program Suppliers or Devotionals), and all news programming should be placed in a single category (be it currently in CTV or PTV). There are many reasons not to make these changes, but it would be inappropriate to adopt such changes for some categories but not others.

## **V. Summary and Conclusions**

18. In summary, the definitional changes proposed by MGC and by Program Suppliers are unnecessary and ill-advised. The 2014-17 Bortz surveys have already been performed and cannot be rerun at this late date. Even if they could be re-run, it would simply not be feasible to identify to respondents which programs in each category were or were not validly claimed. Moreover, based on my experience in designing the Bortz surveys, the long-standing claimant category definitions are clear and readily understandable for system operator executives because they are consistent with how these executives view content when making carriage decisions.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 16, 2020.

  
James Trautman

# **Appendix A**

**JAMES M. TRAUTMAN**  
Managing Director and Principal

Bortz Media & Sports Group, Inc.  
4600 S. Syracuse St., Suite 900  
Denver, Colorado 80237  
303-893-9903 (Direct)  
[trautman@bortz.com](mailto:trautman@bortz.com)

---

## **EXPERIENCE:**

### ***Managing Director and Principal, Bortz Media & Sports Group, Inc. (1988 to Present)***

- ❑ Leads media/entertainment practice for analytically-based consulting firm.
- ❑ Expertise is concentrated in applied market, economic and competitive analysis – focusing on analysis and valuation of content rights, programming networks, broadcast stations and cable properties; analysis of the cable, satellite and broadcast industries; evaluation of trends in media/entertainment market evolution; analysis of advertising markets; analysis of media industry, company and product/service economics; market forecasting/demand assessment; analysis of consumer preferences and audience behavior; and survey research.
- ❑ Extensive consulting history for a wide range of major media organizations is combined with considerable experience in expert testimony and litigation support.

Additional detail on primary areas of expertise includes:

#### **Expert Testimony/Litigation Support**

Has provided comprehensive analysis and expert testimony for multiple law firm clients including Arnold & Porter Kaye Scholer LLP; Baker McKenzie; Wachtell, Lipton, Rosen & Katz; Patton Boggs LLP; Coblenz, Patch, Duffy & Bass LLP; Lowenstein Sandler LLP; Piasetzki, Nenniger Kvas LLP; Winston & Strawn; Manatt, Phelps & Phillips; Snell & Wilmer; and Davis Wright Tremaine LLP. Support and testimony has encompassed assessment of programming and programming networks; analysis of industry and firm-level business practices and strategies; valuation of media assets and properties; economic and market analysis of media industries, technologies and planned business ventures; analysis of television viewing data and viewing behavior; and design/execution of market research. Examples include:

- ❑ *United States Copyright Office.* Has served as a principal expert witness on behalf of the Joint Sports Claimants or JSC (consisting of MLB, NFL, NBA, NHL and NCAA) on an ongoing basis over the past 30 years. Has developed and provided comprehensive expert analysis and testimony in numerous adversarial proceedings before the U.S. Copyright Royalty Judges (and their predecessors), primarily addressing the allocation of more than \$300 million in annual copyright royalties among the owners of selected television programming. Most recently submitted

written expert testimony in 2019 and provided oral testimony in early 2018. Specific elements of the analysis and testimony have included the following:

- ✓ Written and oral testimony addressing the relative market value to the cable and satellite television industries of various television programming types, with emphasis on the particular value of live sports programming.
  - ✓ Testimony identifying and evaluating comparative metrics for assessing programming value, and identifying and evaluating marketplace transactions and their economic relevance to the proceedings.
  - ✓ Design and management of annual telephone-based survey research among cable television executives, along with ongoing industry level economic and market analysis addressing the relative value of various programming types.
  - ✓ Written and oral testimony addressing the factors that influence the programming carriage decisions of cable operators and satellite distributors, including evaluation of carriage patterns and market considerations affecting cable networks, cable network pricing, and the value of programming rights.
  - ✓ Written and oral testimony addressing the prospects for digital music services.
  - ✓ Testimony addressing the evolution of and prospects for the cable and direct satellite industries.
- 
- In 2019, provided expert support to a major programming network group in a tax dispute with the Internal Revenue Service. Written testimony and an in-person IRS interview addressed the relative roles of programming and distribution in the valuation of the company's international network assets, rebutting the testimony of an in-house IRS economist.
  - *FidoTV Channel, Inc. v. The Inspirational Network, Inc., Mark Kramer and David Cerrullo*. In 2019, assisted an established programming network in a civil action addressing the financial and operating prospects for a start-up programming network.
  - *In Re Starz Stockholder Litigation*. Provided expert and rebuttal reports regarding the future prospects for and license fees captured by the Starz and Encore networks, as well as the impact of developments in the internet/OTT marketplace on those networks.
  - *Bloomberg L.P. v. Comcast Cable Communications, LLC*. In 2011, developed and submitted an expert declaration to the Federal Communications Commission addressing cable programming industry distribution and channel placement practices, with the FCC ultimately ruling in favor of Bloomberg.
  - *Huff Fund Investment Partnership d/b/a Musashi II, Ltd. et al v. CKx, Inc.* In 2012 and 2013, submitted an expert report evaluating overall broadcast television market economic and viewing trends, focusing on the current market position and long-term

business prospects for the *American Idol* programming franchise, and provided live expert testimony in support of the analysis.

- ❑ *Mike Padberg v. DISH Network, L.L.C.* From 2012 to 2014, provided support to DISH Network in class action litigation addressing a subscription television programming dispute. Submitted multiple expert reports assessing the behavior of satellite and other subscription TV customers, how those customers make purchasing decisions, and the nature of consumer interest as related to certain programming networks.
- ❑ *TiVo, Inc. vs. Motorola Mobility, Inc. et al.* In 2012 and 2013, provided written expert testimony on behalf of TiVo, Inc. in patent litigation. Testimony addressed the growth of DVR technology, market factors underlying that growth, and the role that TiVo's patents played in contributing to the consumer adoption of and subscription TV market value of DVR products. The emergence and growth of "consumer-controlled television" and its implications for the viewing experience was specifically highlighted and evaluated.
- ❑ *In Re Lehman Brothers Holdings, Inc. et al, Debtors.* From 2013 to 2015, provided expert support to Kaye Scholer LLP on behalf of Spanish Broadcasting System, Inc. (SBS), a major radio station group owner. Provided both expert support and a written expert report analyzing the audience and advertising impacts on SBS of Lehman Brothers failure to fund an established SBS line of credit.
- ❑ *Canadian Copyright Royalty Board.* Retained from 2010 to the present by a major Canadian copyright collective to analyze program-specific viewing data for more than 50 broadcast television stations and develop expert reports addressing viewing patterns.
- ❑ *In Re Scientific-Atlanta, Inc. Securities Litigation.* In 2008 and 2009, provided comprehensive expert support, written testimony and deposition testimony on behalf of manufacturing firm Scientific-Atlanta, Inc. (a Cisco subsidiary) in connection with ongoing class action litigation. Support and testimony evaluated cable industry financial performance, growth characteristics, technology trends, marketing practices, supplier characteristics and other factors as a basis for determining whether Scientific-Atlanta's internal growth projections and public representations during the class period were reasonable.
- ❑ *Charter Communications Holding Company, LLC, and Charter Communications Operating, LLC v. DIRECTV, Inc.* Provided expert analysis, a written expert report and deposition testimony on behalf of DirecTV in connection with a false advertising claim brought against the company. This analysis evaluated the current operating performance and future operating prospects of one of the company's competitors by comparing the performance of the competitor to key industry benchmarks and the performance of its peers.

- ❑ *USA v. Barford, Kalkwarf and Smith.* Provided comprehensive expert support over a three-year period on behalf of an individual defendant in connection with an action brought by the Justice Department against Charter Communications and several Charter executives. Support related to a variety of issues including subscriber growth expectations and results for Charter and the market conditions that affected those expectations.
- ❑ *Schonfeld v. Hilliard, et al.* Provided expert support, written and deposition testimony addressing the market/economic prospects for and potential value of a television programming network. Analysis detailed the operating economics of a start-up/early stage news network, as well as the market factors influencing the distribution potential, licensing value and cost structure of the network.
- ❑ *Alabama TV Cable, Inc. v. Locust Mountain Partners, II, LP, et al.* Provided written testimony addressing the fair market value of selected cable television systems, and rebuttal testimony discussing the economic and market factors that influence market value.
- ❑ *Gramercy Park Investments, et al v. Jones Intercable, Inc., et al.* Provided written testimony addressing the fair market value of several cable television systems.
- ❑ *Charter Communications, Inc. v. James H. ("Trey") Smith, III.* Developed written testimony addressing cable television industry business and marketing practices.
- ❑ On multiple occasions, provided expert support in similar litigation in which settlements were reached prior to submission and/or preparation of testimony.

*Industry and Firm-Level Economic, Market and Competitive Analysis*

Retained by dozens of major clients including A&E Television Networks, Blackstone Group, CBS, Comcast, Corporation for Public Broadcasting, Cox Communications, Discovery Communications, Disney/ABC, ESPN Networks, Gannett, Landmark Communications, MTV Networks, National Public Radio, Times Mirror, Time Warner, Tribune, The Washington Post Company, Major League Baseball, the National Basketball Association, NCTA -- The Internet & Television Association, the Big 12 Conference, Crown Media, Scripps Networks, Public Broadcasting Service (PBS), Spanish Broadcasting System (SBS), Verizon Communications and the United States Olympic Committee (USOC). Example of projects and consulting services include:

- ❑ Has analyzed the fair market value of television, radio and Internet rights for numerous major programming rights holders (focusing on sports rights), encompassing content with rights values totaling more than \$20 billion. Analyses consider the audience potential, advertising prospects and other economic drivers of the content, as well as cost factors. In so doing, assessments specifically consider and forecast the economic performance of the distributing station or network as a result of acquiring the programming. Valuation services have in numerous instances been

accompanied by support to rights holders in negotiations with stations and programming networks.

- ❑ Currently assisting an owner of major professional sports properties in evaluating the prospects for a potential regional sports network and other distribution opportunities for its key programming rights. Consulting support includes assessment of the value of the media rights for the owner's sports properties, economic modeling underlying the prospective network, and assistance in negotiations with the current network distributor of the sports properties.
- ❑ In 2019, assisted a major MVPD in affiliate contract negotiations with a major programming network group owner. This assignment built on prior experience assisting both programming networks and MVPDs in affiliate contract negotiations. Assignments have included detailed review of existing agreements, evaluation of term sheets and other proposals, and recommendations regarding "fair market value" deal terms based on assessment of the current television market environment.
- ❑ Provided business development support to and/or evaluated market/economic prospects and revenue models for more than 50 existing and proposed subscription TV programming ventures. Assignments have addressed both national networks and regional sports and news networks. Clients/properties have ranged from planning stage concepts (e.g., Outdoor Life – now NBC Sports Network, U.S. Olympic Network) to services in the early stages of development (e.g., ZDTV – now Esquire, Classic Sports Network – now ESPN Classic) to widely penetrated networks such as ESPN, Discovery and HGTV. Assignments have encompassed initial business model development, projections of viewing levels and advertising potential, marketing/sales planning, assistance in affiliate contract negotiations, programming strategy and programming acquisition, and service implementation.
- ❑ Analyzed financial prospects and estimated the fair market value of over 100 cable television properties both domestically and internationally. Assessments of current and future cable television economics have also been developed on a recurring basis for a major financial institution, as well as an international consulting organization.
- ❑ Created and subsequently directed Bortz Media's subscription television industry competitive assessment practice over a period of more than 15 years. Services provided to major cable companies included ongoing, comprehensive analysis of satellite and other competitors -- addressing business strategies, operating economics, technical capabilities/constraints and the overall threat profile presented by DIRECTV, DISH Network and other cable competitors. In connection with these engagements, monitored and assessed performance and growth trends, and developed market level strategic and tactical plans for cable operators to address satellite competition. These analytical and planning efforts emphasized competitor economics and consumer marketing strategies, as well as the development/deployment of new consumer products and technologies including digital settop boxes, DVRs, video-on-demand, HDTV, interactive television, high-speed Internet and telephone service.



- The economics and marketing of competitive services and new television products has been an ongoing focus. Examples of new product-related assignments include:
  - ✓ For a major content owner, evaluates media market trends and implications on an ongoing basis. The implications of Internet video distribution, tiering, channel placement and ownership of the organization's network distribution outlets has been a specific focus. Mobile distribution opportunities and economics, on-demand economics and interactive advertising prospects have also been assessed.
  - ✓ For multiple clients, assessed the initial evolution of and long-term market prospects for Direct Broadcast Satellite services, including specific evaluation of various orbital licensees and early entrants.
  - ✓ For Cox, provided a comprehensive assessment of current and likely future satellite competitor technology and marketing/promotional initiatives as a basis for devising Cox product, packaging and marketing strategies.
  - ✓ For multiple clients, assessment of Internet-based video content distribution prospects, considering both economic opportunities and potential risks to existing distributors. Analyses have specifically addressed Internet-based delivery of movies and other television programming and its implications for cable networks and video-on-demand services.
  - ✓ Designed and managed consumer research and provided recommendations to Comcast regarding the composition, packaging and pricing of the company's initial digital service tiers in preparation for the deployment of digital settop boxes.
  - ✓ Assessment of the relative merits of cable HFC distribution infrastructure and telephone company fiber optic network architecture from a consumer perspective, emphasizing the relative advantages and disadvantages of each technical approach in terms of services and features provided to subscribers. Based on this assessment, developed detailed recommendations regarding client positioning and communications strategies in response to telephone company marketing initiatives.
  - ✓ For Cox, analyzed HDTV opportunities and timing considerations with respect to initial deployment of HDTV services.
  - ✓ Assessment of home video rental market trends and prospects in the context of the evolution of cable-based video-on-demand services.
  - ✓ Assessment of the premium television market, including prospects for major premium TV providers and the impact of movie distribution alternatives (including video-on-demand, Netflix and Internet-based services) on premium television content strategies.

- ❑ On behalf of the National Cable & Telecommunications Association (NCTA), authored Investing in America: The Cable Industry's Impact on People, Infrastructure and Programming. This comprehensive economic impact analysis, released in 2019, analyzed cable industry subscriber growth patterns and operating characteristics and utilized input-output modeling techniques to evaluate cable industry financial flows. These flows were then used to quantify the industry's direct and indirect contributions to U.S. employment, personal income and gross economic output at the national level as well as by individual Congressional District. Earlier versions of this analysis were prepared in 2017, 2015, 2013, 2011, 2008, 2003, 1998, 1990 and 1986. An update of the analysis was prepared earlier in 2019.
- ❑ Analyzed financial prospects and estimated the fair market value of numerous local television and radio stations, in markets ranging from the largest to the smallest. Analyses evaluate market trends and likely future market capture in terms of both advertising revenue and audience, resulting in the development of pro forma financial projections.
- ❑ Co-author of Digital Broadcasting: Where Do We Go From Here? This report, released in 2010, evaluated future business prospects and market opportunities for the broadcast television industry – focusing on multicasting, mobile video and other services enabled by digital transmission technology.
- ❑ For a major broadcast television network, assessed digital television opportunities, considered technological and market factors in defining a digital television strategic focus, and developed recommendations relating to cable distribution of digital signals and high definition programming.
- ❑ Provided comprehensive digital transition business planning assistance to the Corporation for Public Broadcasting, the Association of Public Television Stations, the Ford Foundation, the James Irvine Foundation and selected individual public broadcasters. These assignments assessed new service opportunities and involved working with individual public television (PTV) stations to develop digital service/financial models. Elements of the projects included assessment of the overall media environment and its implications for PTV (focusing on the impact of emerging technologies), exploration of digital capacity utilization issues and alternatives (including data-driven, interactive and commerce-based applications), and evaluation of partnership opportunities with both for profit and non-profit entities.
- ❑ Assisted various other public broadcasting organizations in numerous engagements over the past 20 years. In addition to the assignments noted above, these have included development of comprehensive market analyses, development of service and operating structure recommendations for stations, evaluation of advertising potential, assessment of merchandising and licensing practices, support in negotiations for programming distribution, and assessment of Internet business opportunities.

- ❑ On behalf of the Corporation for Public Broadcasting, completed a comprehensive, multi-phase assessment of digital radio opportunities, addressing the market potential for both terrestrial and satellite-delivered digital radio in the context of projected future radio market trends.
- ❑ On multiple occasions, provided strategic planning assistance to National Public Radio. Assignments encompassed in-depth interviews with NPR affiliate stations, assessment of audience trends and recommendations relating to program scheduling.
- ❑ Provided strategic planning assistance to Landmark Communications on multiple occasions, supporting the company's efforts to enhance its television station operations.
- ❑ In the mid-1980s, developed and conducted an annual Cable Operating Performance Benchmarks study for participating cable companies on behalf of the National Cable & Telecommunications Association. This study focused on the interrelationships between operating characteristics and financial performance at the cable system level, utilizing detailed operating, financial and market information from more than 150 separate cable systems. Separate industry level analyses have addressed the industry's economics and financial characteristics on numerous subsequent occasions.
- ❑ Designed, managed and executed a wide range of quantitative and qualitative research studies, including statistically representative national (as well as local and regional) telephone surveys, Internet-based surveys, focus groups, one-on-one interviews and new product trials.

***Senior Associate, BBC, Inc.* (1983 to 1988)**

Responsible for execution of multi-faceted research and analytical assignments addressing industries including media, entertainment and telecommunications, real estate, banking and public facilities/recreation.

**EDUCATION:**

M.B.A., Finance (1990), University of Colorado

B.S., Economics (1982), Claremont McKenna College, Claremont, California

**OTHER:**

Author of Investing in America and Public Television's Transition to a Digital Future. Co-Author of Digital Broadcasting: Where Do We Go From Here?; Public Television in the Information Age; Great Expectations: A Television Manager's Guide to the Future; and Sports on Television: A Whole New Ballgame.

**Exhibit E - Declaration of William E. Wecker, Ph.D. and R.  
Garrison Harvey**

Before the  
**COPYRIGHT ROYALTY JUDGES**  
The Library of Congress

*In re*

**NOTICE OF INQUIRY REGARDING  
CATEGORIZATION OF CLAIMS FOR  
CABLE OR SATELLITE ROYALTY  
FUNDS AND TREATMENT OF  
INELIGIBLE CLAIMS**

**Docket No. 19-CRB-0014-RM**

**DECLARATION OF WILLIAM E. WECKER AND R. GARRISON HARVEY**

**MARCH 16, 2020**

## **I. Qualifications**

### **Dr. William E. Wecker**

1. I am a statistician and applied mathematician. I received the Bachelor of Science degree (Basic Sciences) from the United States Air Force Academy. I received both the Master of Science degree (Operations Research) and Doctor of Philosophy degree (Statistics and Management Science) from the University of Michigan. I have served on the faculties of the University of Chicago, the University of California, Davis, and Stanford University where I taught statistics and applied mathematics at the graduate level. I have performed research in statistical theory, statistical methods, and applied mathematics for over four decades.

2. I am currently Chairman of William E. Wecker Associates, Inc., an applied mathematics consulting firm located in Jackson, Wyoming. I am a member of the American Statistical Association, the Institute of Mathematical Statistics, and the Society for Risk Analysis. I have served as associate editor of the Journal of the American Statistical Association for four years and of the Journal of Business and Economic Statistics for eighteen years. A copy of my curriculum vitae is attached as Appendix A.

### **Mr. R. Garrison Harvey**

3. I am a statistician and applied mathematician. I received the Bachelor of Science degree (Applied Mathematics) from the United States Air Force Academy and the Master of Science degree (Operations Research) from the Air Force Institute of Technology. I am currently President and Principal Consultant at William E. Wecker Associates, Inc. I have served as an expert witness in litigation, arbitration and regulatory proceedings in matters evaluating damages, breach of contract, copyright infringement, consumer product performance, epidemiology, sample design, credit card market analysis and profitability, statistical analysis of credit card industry data, and class certification. Additionally, I have worked as a consultant on many litigation and business

consulting engagements including: antitrust matters involving price-fixing, false advertising, unfair competition and monopolization, consumer product safety and performance, environmental damage, class actions alleging disparate impact in insurance, insurance claims, lending and wages, patent and intellectual property matters involving pharmaceutical drugs, petrochemical formulation, and automobile devices. These qualifications and a list of my professional publications are in my curriculum vitae which is appended to this report as Appendix B.

## **II. Analysis**

### **A. Purpose**

4. We understand the Copyright Royalty Judges (“Judges”) have announced an inquiry into the categorization of programming claimed in copyright royalty distribution proceedings, as well as the treatment of unclaimed and invalidly claimed programming in those proceedings. *See* Notice of Inquiry Regarding Categorization of Claims for Cable or Satellite Royalty Funds and Treatment of Ineligible Claims, 84 Fed. Reg. 71,852 (Dec. 30, 2019).

5. The purpose of this declaration is to provide the Judges with factual information concerning the quantity of distantly retransmitted programming at issue in a typical Allocation Phase proceeding. In order to provide this factual information, we analyze data concerning the distant programming that Form 3 cable system operators distantly retransmitted during the 2014-17 time period. We understand that these royalties are the subject of a pending Allocation Phase proceeding.

### **B. Data**

6. We have obtained data from Cable Data Corporation (“CDC”) which maintains a database of the broadcast channels that Form 3 cable systems distantly retransmitted pursuant to the Section 111 compulsory license (“CDC Data”). CDC collects this data from the statements of account that Form 3 cable systems file with the Copyright Office on a semi-annual basis.

7. We have obtained programming data from FYI Television, Inc. (“FYI Data”) for over 97% of the total broadcast minutes airing on these distantly retransmitted signals—roughly 67 million distantly retransmitted broadcasts (50 million broadcast hours) across all call signs over the four-year period. The FYI Data provide “TV Guide” style information concerning the identity of each program carried by a particular broadcast channel. For example, they show that on WWOR-DT, at 7 p.m. Eastern Standard Time on May 13, 2014, the New York Mets played the New York Yankees.

C. Results

8. The CDC Data show that, for each accounting period (i.e., six-month period) in the years 2014 to 2017, Form 3 cable systems distantly retransmitted roughly 1300 to 1600 broadcast channels per accounting period.

9. The FYI Data show that Form 3 cable systems distantly retransmitted tens of thousands of unique, non-network programs during the 2014-17 period (unique programs can be transmitted by multiple call signs, but we only count them once across all transmissions).

10. The 2014-17 CDC Data indicate that only five Mexican broadcast signals, XEPM, XERV, XHAB, XHILA, and XHOR, were distantly retransmitted by Form 3 cable systems during the 2014-17 period. Only three unique cable systems chose to retransmit these signals: (1) the Time Warner Cable system serving Pharr, TX for XHOR, XHAB, and XERV; (2) the Time Warner Cable serving Winterhaven, CA for XHILA; and (3) the Comcast system serving Albuquerque, NM for XEPM.

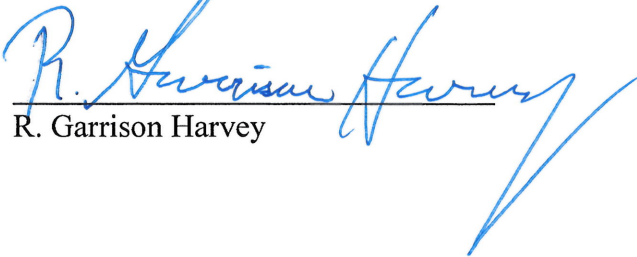
11. In the 2014-17 period, distantly retransmitted live broadcasts of Olympic competitions or U.S. Olympic trials occurred primarily on NBC affiliates; about 11% of these telecasts appeared on stations not affiliated with NBC. These non-NBC Olympics telecasts comprise approximately 0.013% of all distantly retransmitted broadcast minutes in the FYI Data.



I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 13, 2020.

  
\_\_\_\_\_  
William E. Wecker

  
\_\_\_\_\_  
R. Garrison Harvey

# **Appendix A**

## **WILLIAM E. WECKER**

270 E Simpson Ave  
PO Box 1010  
Jackson WY 83001-1010

Telephone: (307) 732-6850  
E-Mail: [wecker@wecker.com](mailto:wecker@wecker.com)

### **EDUCATION**

B.S. Basic Science, U.S. Air Force Academy (1963)  
M.S. Operations Research, University of Michigan (1970)  
Ph.D. Statistics and Management Science, University of Michigan (1972)

### **EMPLOYMENT**

1963-1967 Fighter pilot, U.S. Air Force  
1968-1969 Chief of Protocol, U.S. Air Force, Berlin, Germany  
1970-1972 Graduate Student, University of Michigan  
1973-1976 Assistant Professor, Graduate School of Business, University of Chicago  
1977-1983 Associate Professor, Graduate School of Business, University of Chicago  
1984-1985 Associate Professor, Graduate School of Management, University of California, Davis  
1985-1989 Professor, Graduate School of Management, University of California, Davis  
1994-1998 Consulting Professor of Law, School of Law, Stanford University  
1990-2020 President, William E. Wecker Associates, Inc.  
2020- Chairman, William E. Wecker Associates, Inc.

### **ACTIVITIES**

1977-1981 Associate Editor (Theory and Methods), Journal of the American Statistical Association  
1981-1999 Associate Editor, Journal of Business and Economic Statistics  
1990-1992 Management Committee, Journal of Business and Economic Statistics  
1976-1994 Seminar Leader, NSF/NBER Seminar on Time Series Analysis  
1993-1994 National Advisory Council on Environmental Policy and Technology  
(Lead Subcommittee)  
  
Member of: American Association for the Advancement of Science  
American Statistical Association  
Institute of Mathematical Statistics  
Society for Risk Analysis

## **PUBLICATIONS**

- “A Nonparametric Approach to the Construction of Prediction Intervals for Time Series Forecasts” (with W. A. Spivey), Proceedings of the Business and Economic Statistics Section--American Statistical Association, 1972.
- “Regional Economic Forecasting: Concepts and Methodology” (with W. A. Spivey), The Regional Science Association Papers, Vol. 28, 1972, pp. 257-276.
- “On the Weighted Average Cost of Capital” (with R. R. Reilly), Journal of Financial and Quantitative Analysis, January 1973, Vol. VIII, pp. 123-126.
- “On Random Walks with Absorbing Barriers” (with Thomas E. Morton), Proceedings of the Business and Economic Statistics Section-- American Statistical Association, 1973.
- “Prediction Methods for Censored Time Series,” Proceedings of the Business and Economic Statistics Section--American Statistical Association, 1974.
- “More on the Weighted Average Cost of Capital: Reply” (with R. R. Reilly), Journal of Financial and Quantitative Analysis, June 1975.
- “Predicting Mail Order Demand for Style Goods,” Proceedings of the Business and Economic Statistics Section--American Statistical Association, 1975.
- “The Prediction of Turning Points,” Proceedings of the Business and Economic Statistics Section-- American Statistical Association, 1976.
- “Bounds on Absorption Probabilities for the m-Dimensional Random Walk” (with T. Morton), Journal of the American Statistical Association, March 1977.
- “Discounting, Ergodicity and Convergence of Markov Decision Processes” (with T. Morton), Management Science, April 1977.
- “Comments on ‘Forecasting with Econometric Methods: Folklore versus Fact’,” Journal of Business, 1978, pp. 585-586.
- “Comment on ‘Seasonal Adjustment When Both Deterministic and Stochastic Seasonality Are Present’,” Proceedings of the NBER-CENSUS Conference on “Seasonal Analysis of Economic Time Series,” U.S. Government Printing Office, Washington, D.C., 1978, pp. 274-280.
- “Predicting Demand from Sales Data in the Presence of Stockouts,” Management Science, 1978, Vol. 34, No. 10, pp. 1043-1054.
- “The Time Series Which Is the Product of Two Stationary Time Series,” Stochastic Processes and Their Application, 1978, pp. 153-157.
- “Predicting the Turning Points of a Time Series,” Journal of Business, January 1979, Vol. 52, pp. 35-50.

- “A New Approach to Seasonal Adjustment,” Proceedings of the Business and Economic Statistics Section--American Statistical Association, 1979.
- “Linear and Nonlinear Regression Viewed as a Signal Extraction Problem” (with C. Ansley), Proceedings of the Business and Economic Statistics Section-- American Statistical Association, 1980.
- “Asymmetric Time Series,” Journal of the American Statistical Association, March 1981.
- “Predicting a Multitude of Time Series” (with R. A. Thisted), Journal of the American Statistical Association, September 1981.
- “Applications of the Signal Extraction Approach to Regression” (with C. Ansley), Proceedings of the Business and Economic Statistics Section--American Statistical Association, 1981.
- “Nonparametric Multiple Regression by Projection Iteration” (with C. Ansley), Proceedings of the Business and Economic Statistics Section--American Statistical Association, 1982.
- “The Signal Extraction Approach to Nonlinear Regression and Spline Smoothing” (with C. Ansley), Journal of the American Statistical Association, March 1983.
- “Extensions and Examples of the Signal Extraction Approach to Regression” (with C. Ansley), Applied Time Series Analysis of Economic Data, A. Zellner (ed.), Washington, D.C.: Bureau of the Census/ASA, 1983.
- “The Signal Extraction Approach to Estimating Income and Price Elasticities: A Data Example” (with C. Ansley), Proceedings of the Business and Economic Statistics Section--American Statistical Association, 1983.
- “A Nonparametric Bayesian Approach to the Calibration Problem,” (with C. Ansley), Proceedings of the Business and Economic Statistics Section--American Statistical Association, 1984.
- “On Dips in the Spectrum of a Seasonally Adjusted Time Series” (with C. Ansley), Journal of Business and Economic Statistics, October 1984.
- “Estimating Damages in a Class Action Litigation” (with E. George), Journal of Business and Economic Statistics, April 1985.
- “Making Statistics More Effective in Schools of Business: Interdisciplinary Cooperation” (with R. Hamada, J. Patell, R. Staelin), Proceedings of the Business and Economic Statistics Section-- American Statistical Association, 1986.
- “The Role of Statistics in Accounting, Marketing, Finance and Production” (with R. Hamada, J. Patell, R. Staelin), Journal of Business and Economic Statistics, 1988.
- “Assessing the Accuracy of Time Series Model Forecasts of Count Observations,” Journal of Business and Economic Statistics, October 1989.

- “Impact of the Soviet Grain Embargo; A Comparison of Methods” (with A. Webb, et al ), Journal of Policy Modeling, pp. 361-389, 1989.
- “Modeling Daily Milk Yield in Holstein Cows Using Time Series Analysis” (with H. Deluyker, et al.), Journal of Dairy Science, pp. 539 - 548, 1990.
- “Controlling Emissions from Motor Vehicles: A Benefit-Cost Analysis of Vehicle Emission Control Alternatives” (with L. Lave, et al.), Environmental Science & Technology, August 1990.
- “Statistical Estimation of Incremental Cost from Accounting Data” (with R. Weil), Handbook of Litigation Services for Accountants and Lawyers, John Wiley & Sons, 1990.
- “Correcting for Omitted-Variables and Measurement-Error Bias in Regression with an Application to the Effect of Lead on IQ” (with M. L. Marais), Journal of the American Statistical Association, June 1998.

## **Appendix B**

## **R. GARRISON HARVEY**

January 2020

William E. Wecker Associates, Inc.  
270 E. Simpson Avenue  
Jackson, WY 83001-1010

Telephone: (307) 732-6850  
E-Mail: Harvey@Wecker.com

Gary Harvey is President and Principal Consultant at William E. Wecker Associates, Inc. based in Jackson Hole, WY. He received the Bachelor of Science degree in Applied Mathematics from the United States Air Force Academy and the Master of Science degree in Operations Research from the Air Force Institute of Technology. Prior to joining William E. Wecker Associates, Inc. he was an officer in the U.S. Air Force analyzing U.S. force structure and weapon systems performance.

He has served as an expert witness in litigation, arbitration, and regulatory proceedings involving evaluation of damages, breach of contract, copyright infringement, consumer product performance, epidemiology, sample design, payment card market analysis and profitability, statistical analysis of payment card industry data, and class certification.

Additionally, he has worked as a consultant on numerous litigation and business consulting engagements including: antitrust matters involving claims of price-fixing; matters involving claims of false advertising, unfair competition and monopolization, consumer product safety and performance, and environmental damage; class actions alleging disparate impact in insurance, insurance claims, lending, and wages; and patent and intellectual property matters involving pharmaceutical drugs, petrochemical formulation, and automobile components.

Mr. Harvey has expertise in statistical and mathematical analysis of data. This expertise includes damage analysis; survey design, analysis and administration; U.S. and international payment card market analysis, profitability and forecasting; human health and epidemiology involving tobacco risks, dynamic propagation of viruses, pharmaceutical drugs, and consumer products; automobile safety and valuation; hospital data analysis; class certification; evaluation of insurance claims including allocation among primary and excess insurance carriers; regression analysis; survival analysis; Bayesian analysis including imputation of missing data, propensity score analysis, conjoint analysis, forecasting, and big data analysis.

### **EDUCATION**

B.S. (Applied Mathematics) (1988), USAF Academy  
M.S. (Operations Research) (1992), Air Force Institute of Technology



## **PROFESSIONAL EXPERIENCE**

2020 - President, Principal Consultant, William E. Wecker Associates, Inc.  
2000 - 2019 Vice-President, Principal Consultant, William E. Wecker Associates, Inc.  
1996 - 1999 Senior Consultant, William E. Wecker Associates, Inc.  
1992 - 1995 Scientific Analyst, Officer USAF, Scott AFB, IL  
1992 - 1995 Adjunct Professor, Belleville Area College, Belleville, IL  
1992 - 1993 Total Quality Management Instructor, Officer USAF, Scott AFB, IL  
1990 - 1992 Graduate Student, Officer USAF, Air Force Institute of Technology  
1988 - 1990 Scientific Analyst, Officer USAF, Vandenberg AFB, CA

## **HONORS**

Meritorious Service Medal (MSM) while officer in US Air Force.  
Air Mobility Command Officer of the Year, 1993.  
Barchi Prize, 1994 Military Operations Research Society.  
Best Application of Operations Research/Management Science Achievement Award, 1993. Institute of Management Science/Operations Research Society of America, St. Louis Gateway Chapter.

## **SELECT EXPERT REPORTS, TESTIMONY, DECLARATIONS AND PROCEEDINGS**

- Testifying expert for Visa and major US banks (e.g., Bank of America, Barclays, Capital One, Citibank, Fifth Third, HSBC, JPMorgan Chase, PNC, SunTrust, and Wells Fargo) in \$30B Payment Card Interchange Fee and Merchant Discount Antitrust Litigation. Issues involved damage calculations, payment card market analysis, profitability, but-for world benchmarks and big data analysis.
- Testifying expert for Visa in litigation with credit card cobrand partner Black Card. Issues involved damage calculations, breach of contract, consumer product performance, credit card market analysis and profitability.
- Testifying expert for Major League Baseball, National Football League, National Basketball Association and Women's National Basketball Association in Cable Royalty Distribution Proceedings. Issues involved sample analysis of Nielsen data to determine the relative economic value of programming and the allocation of cable royalty revenues.
- Testifying expert for Major League Baseball, National Football League, National Basketball Association and Women's National Basketball Association in Satellite Royalty Distribution Proceedings. Issues involved sample analysis of Nielsen data to determine the relative economic value of programming and the allocation of satellite royalty revenues.
- Testifying expert for Altria Client Services LLC, testimony at the FDA's Tobacco Products Scientific Advisory Committee regarding a proposed "modified risk" claim. Issues involved morbidity and mortality of reduced risk tobacco products, and survival analysis.
- Testifying expert for Allianz SE Insurance Company in asbestos coverage litigation for historical products and operations claims. Issues involved sample design and analysis, products/operation insurance coverage, forecasting, and primary and excess insurance policy allocation analysis.
- Testifying expert for BP Solar International, Inc. in class action litigation. Issues involved damage calculations, product failure analysis, sample design, sample analysis and forecasting.

- Testifying expert for Chase Bank in litigation with major retail cobrand partner. Issues involved damage calculations, consumer product performance, forecasting, credit card market analysis and profitability of card portfolio.
- Testifying expert for firearms manufacturers in litigation on gun sales and tracing. Issues involved sample design and analysis, the relationship between gun availability and crime, and forecasting.
- Testifying expert for R.J. Reynolds Tobacco Company in class action litigation. Issues involved epidemiology, data analysis, survival analysis, association of smoking cessation and disease risk.

#### **SELECT CONSULTING EXPERIENCE**

- Analysis of payment card partnerships, profitability, and future market share in a dispute between Visa, US issuing banks and American Express.
- Analysis of payment card partnerships, profitability, and future market share in a dispute between Visa, US issuing banks and Discover Card.
- Tobacco Health Care Cost Recover Cases in the US and internationally. Analyses to assess various methods to estimate disease and health care costs attributable to various risk factors, role of various risk factors on historic and future health care costs, disease risk of smoking and role of smoking cessation, financial analyses, historic and future health care costs, detailed analysis of hospital and medical treatment data.
- Litigations involving low-tar and light cigarettes delivery of tar and nicotine, differential biomarker levels attributable to tar levels, health risks, tar levels effects on smoking behaviors and damages.
- Analyses of automobile safety and accident epidemiology for Ford, GM and Fiat Chrysler.
- Analyses of product performance, determining size and scope of automotive recalls, and damages analyses for Ford, GM and Fiat Chrysler.
- Analysis of GEICO automobile insurance underwriting and pricing model.
- Analyses of loan approval criteria and charge-offs for consumer loan portfolios.
- Analyses of consumer product performance and safety related to windows, solar panels, house siding, cell phones, office products, hospital products, and other consumer products.
- Analyses of strategic war fighting capability associated with alternative Air Force aircraft fleet structure, effect on warfighting scenarios and relative costs trade-offs. Presented analyses to members of congress, Joint Chiefs of Staff, Secretary of Defense, Deputy Secretary of Defense, every four-star general in the Air Force, and numerous other governmental and military organizations.
- Analyses of medical insurance plans and hospitalization data.
- Damages analyses in business interruption cases.
- Analyses of healthcare costs and disease attributable to asbestos exposure.
- Analyses of insurance coverage issues related to asbestos exposure. Issues involved sample design and analysis, products/operation insurance coverage, forecasting, and primary and excess insurance policy allocation analysis.
- Analyses of insurance coverage related to environmental chemical exposure.
- Analyses of international Visa payment card markets and role of government regulation.
- Analyses of prescription drug formulation, role of manufacturing process, and results of clinical studies in patent dispute cases.

- Reduced risk tobacco products impact on morbidity risks, mortality risks, smoking cessations and initiation.
- Analysis of gasoline formulation and role of manufacturing process in patent dispute.
- Analysis of deep-water oil drilling historical designs, procedures, performance, mishaps and exceptions.
- Analyses of rocket reliability, accuracy and navigation reliability.
- In-car navigation system patent and performance analysis.
- Analysis of Environmental Impact Report related to the development of housing units.
- Hospital efficiency, scheduling and patient outcome analysis for the Surgeon General of the Air Force.
- Analyses of methods to increase efficiency, decrease costs and decrease delays in Air Force air transportation for the U.S. Transportation Command.
- Evaluation of potential new joint-service wargaming models at the request of the Secretary of the Air Force.

#### **PUBLICATIONS and NON-TESTIMONY PRESENTATIONS**

- "Constrained System Optimization and Capability Based Analysis" (with K. Bauer, J. Litko), Military Operations Research, Vol 2, No 4, 1997, pp. 5-19.
- "Military Modeling and Simulation: Reflections and Directions", 1994 Winter Simulation Conference Proceedings, pp. 741-743.
- "Constrained System Optimization and Capability Based Analysis", 62nd Military Operations Research Society, National Meeting, 1993.
- "Force Allocation Through Constrained Optimization", 61st Military Operations Research Society, National Meeting 1993. Awarded Best Working Group Paper.
- "Experimental Design Considerations in the Optimization of Stochastic Response Surfaces", Sponsored Session presentation, TIMS/ORSA Joint National Meeting, Chicago 1993.
- "C-141 Depot Maintenance: Using Simulation to define Resource Requirements" (with T. Schuppe, D. McElveen, P. Miyares), Air Force Journal of Logistics, Winter-Spring 1993, pp. 11-15.
- "Force Allocation Through Constrained Optimization of Stochastic Response Surfaces" (with K. Bauer, J. Litko), 1992 Winter Simulation Conference Proceedings, pp. 1121-1129.
- "C-141 Depot Maintenance: Using Simulation to Define Resource Requirements" (with T. Schuppe, D. McElveen, P. Miyares), 1992 Winter Simulation Conference Proceedings, pp. 1145-1152.
- Invited lectures at: University of Washington in St. Louis, University of St. Louis, United States Air Force Academy, Air Force Institute of Technology, and Pentagon Studies and Analysis group.

## **Exhibit F - Proposed Regulations**

AMEND 37 C.F.R. § 351.3 BY ADDING NEW PARAGRAPH (d) AS FOLLOWS:

(d) *General procedures for cable and satellite royalty distribution proceedings.*

(1) The Copyright Royalty Judges shall conduct cable and satellite royalty distribution proceedings in two phases:

- i. Allocation Phase. In the Allocation Phase, the Copyright Royalty Judges shall resolve controversies concerning the allocation of royalties among claimant categories. In the Allocation Phase, the Copyright Royalty Judges shall allocate royalties among the claimant categories as though all eligible claimants in each claimant category have filed valid claims;
- ii. Distribution Phase. In the Distribution Phase, the Copyright Royalty Judges shall resolve controversies concerning the distribution of funds within the claimant categories;

(2) For purposes of this paragraph, the term “claimant categories,” when used in a cable royalty distribution proceeding, shall refer to the following mutually-exclusive categories of programming:

- i. Canadian Claimants. All programs broadcast on Canadian television stations, except:
  - A. live telecasts of Major League Baseball, National Hockey League, and U.S. college team sports; and
  - B. other programs owned by U.S. copyright owners;
- ii. Commercial Television Claimants. Programs produced by or for a U.S. commercial television station and broadcast only by that station during the calendar year in question, except those listed in subpart (C) of the Program Suppliers category;
- iii. Devotional Claimants. Syndicated programs of a primarily religious theme, not limited to programs produced by or for religious institutions;
- iv. Joint Sports Claimants. Live telecasts of professional and college team sports broadcast by U.S. and Canadian television stations, except for programs coming within the Canadian Claimants category;
- v. Music Claimants. Musical works performed during the course of programs that are in the following claimant categories: Program Suppliers, Joint Sports Claimants, Commercial Television Claimants, Public Television Claimants, Devotional Claimants, Canadian Claimants;

- vi. National Public Radio. All non-music programs that are broadcast on NPR Member Stations;
  - vii. Program Suppliers. Syndicated series, specials, and movies, except those included in the Devotional Claimants category. Syndicated series and specials are defined as including:
    - C. programs licensed to and broadcast by at least one U.S. commercial television station during the calendar year in question;
    - D. programs produced by or for a broadcast station that are broadcast by two or more U.S. television stations during the calendar year in question; and
    - E. programs produced by or for a U.S. commercial television station that are comprised predominantly of syndicated elements, such as music videos, cartoons, "PM Magazine," and locally-hosted movies;
  - viii. Public Television Claimants. All programs broadcast on U.S. noncommercial educational television stations;
- (3) For purposes of this paragraph, the term "claimant categories," when used in a satellite royalty distribution proceeding, shall refer to the following mutually-exclusive categories of programming:
- i. Commercial Television Claimants. Programs produced by or for a U.S. commercial television station and broadcast only by that one station during the calendar year in question and not coming within the exception described in subpart (C) of the Program Suppliers category;
  - ii. Devotional Claimants. Syndicated programs of a primarily religious theme, not limited to programs produced by or for religious institutions;
  - iii. Joint Sports Claimants. Live telecasts of professional and college team sports broadcast by U.S. television stations;
  - iv. Music Claimants. Musical works performed during the course of the course of programs that are in the following claimant categories: Program Suppliers, Joint Sports Claimants, Commercial Television Claimants, and Devotional Claimants;
  - v. Program Suppliers. Syndicated series, specials, and movies, except those included in the Devotional Claimants category. Network and nonnetwork syndicated series and specials are defined as including:
    - A. programs licensed to and broadcast by at least one U.S. commercial television station during the calendar year in question;

- B. programs produced by or for a broadcast station that are broadcast by two or more U.S. television stations during the calendar year in question; and
  - C. programs produced by or for a U.S. commercial television station that are comprised predominantly of syndicated elements, such as music video shows, cartoon shows, "PM Magazine," and locally hosted movie shows;
- (4) Nothing herein shall preclude a party to a cable or satellite royalty distribution proceeding from resolving Allocation Phase or Distribution Phase controversies by voluntary agreement.